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No. A-846

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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GUILD TRUST; MELBA L. GUILD; DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,

Petitioners,

vs.

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; UNION PACIFIC LAND RESOURCES CORPORATION, a corporation,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

—0—

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Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the courts below erred in holding, as a matter of unsettled Wyoming real property law with no Wyoming precedent, that a reservation of "all coal and other minerals" and express rights to "mine" the same from "mines", as contained in a 1909 Union Pacific Railroad Company deed conveying a portion of an 1862 twelve-million acre land grant to the Union Pacific to aid in the construction of a railroad, unambiguously reserved the entire mineral estate including oil and gas, if to so hold

(a) the federal courts must ascribe to the State of Wyoming an extreme rule of property law contrary to the uniform rule of the other states that the term "minerals", when used in a deed reservation between private parties and qualified

by the coupling of a specified hard mineral (coal) with the term "other minerals" and by expressly reserved hard rock "mining" rights, is at best for the grantor ambiguous as reserving oil and gas and other mineral substances not recovered by ordinary mining methods;

(b) is to exclude from consideration as irrelevant, petitioners' documentary evidence establishing as a fact that at the time of the contract and deed the Union Pacific did not and could not have intended by said reservation to reserve oil and gas and there is no evidence to the contrary;

(c) is (by holding also that petitioners had received a fair trial because they had been given adequate time after trial to develop their legal arguments to exhaustion and had done so) to exclude from consideration as irrelevant, such fair trial issues as denial

of discovery, inadequate nctice and opportunity to prepare their case and present witnesses and make an adequate record on appeal, inconvenience of the only federal forum available, irreparable harm from unauthorized restraining order, and lack of impartiality of the trial judge.

2. Whether the courts below erred by failing to discuss and rule upon petitioners' evidence and authorities that the reservation was void because the Union Pacific had no title of its own out of which to carve a mineral reservation at the time the lands were sold.

3. Whether the Court of Appeals erred in refusing to consolidate the instant case with the companion case between the same parties before that court, and thus to exclude from consideration in the instant case the extremely

significant matters bearing on both the validity of the deed reservation and the construction to be given it as reserving oil and gas, when petitioners were unable to raise those matters in the instant case because of denial of discovery and inadequate time to prepare and present their case.

4. Whether, given the importance of this case as affecting, perhaps decisively, the ownership of billions of dollars of oil and gas rights in millions of acres of land grant lands owned by thousands of Wyoming landowners whose lands are burdened with Union Pacific "coal and other minerals" reservations, and given the absence of guidance from the Wyoming Supreme Court as to contolling state law, the federal courts should abstain and decline or defer the exercise of their diversity jurisdiction

until the controlling questions of Wyoming law are first decided by the Wyoming Supreme Court, especially if

(a) to decide the case as they did, the federal courts below have ascribed to the State of Wyoming an extreme rule of property law in conflict with the uniform or majority rule of the other states, and

(b) it is necessary, in order to prevent gross injustice to Wyoming landowners and fomentation of unnecessary litigation, to thwart the tactics of giant corporations who by virtue of their non-residency for diversity purposes are in a position to control the forum selection process and to manipulate the judicial system by funneling at their pleasure all and repeated litigation against Wyoming landowners in the Wyoming federal district court, and on the authority of the decision of the Court of

Appeals in this case and without the Wyoming Supreme Court having ever ruled, in unfair summary judgment proceedings capture the minerals in the great bulk of the Wyoming land grant lands.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners Guild Trust, et al., respectfully pray that a writ of certio-

rari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 27, 1980.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 636 F.2d 261. A copy of the opinion is included in the Appendix as Exhibit A. The opinion of the United States District Court for the District of Wyoming is reported at 461 F. Supp. 279. A copy of the opinion is included in the Appendix as Exhibit B.

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JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 27, 1980. A timely combined petition

for rehearing in banc and consolidation of said rehearing with the hearing of a companion case between the same parties before the Court of Appeals was denied on January 14, 1981. A copy of the order denying the combined petition is included in the Appendix as Exhibit G. On April 7, 1981, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including May 14, 1981. The record in this cause was lodged with the Clerk of the United States District Court for the District of Wyoming, Cheyenne, Wyoming, on January 22, 1981, with the return of the mandate (the opinion of the Court of Appeals) to that court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 3 of the Act of July 1, 1862,

12 Stat. 489, is set forth in the Appendix as Exhibit I.

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STATEMENT OF THE CASE

The ultimate issue in this case is whether the deed reservation hereinafter set out validly reserved the oil and gas, or whether those substances passed with the deed to the purchaser. The reservation covers a quarter section of lands ("subject lands") and other lands in Uinta County, Wyoming, where petitioners also live. Petitioners ("Guilds" or "petitioners") are a small ranching family of limited means who collectively own the subject lands as successors to the original purchaser. Respondents Union Pacific Land Resources Corporation ("Resources") and Champlin Petroleum Company ("Champlin") are wholly owned subsidiary corporations of the present Union Pacific

Railroad Company, a Utah corporation ("Railroad" or "present Railroad") and successors to whatever oil and gas rights might have been reserved to the Railroad by the deed reservation. Respondent Amoco Production Company ("Amoco") is Champlin's lessee of the oil and gas rights purportedly reserved. Evanston, the county seat of Uinta County, is 357 miles from Cheyenne, where the federal district court is located. There are no direct airline connections between Evanston and Cheyenne, and it is quicker to drive back and forth than to fly. A full day's driving time is involved each way. The language of the reservation in dispute as reserving oil and gas is as follows:

> "Excepting and reserving to said Union Pacific Railroad Company, its successors and assigns,
>
> Second: All coal and other minerals within or underlying said lands.
>
> Third: The exclusive right to pro-

spect in and upon said land for coal and other minerals therein, or which may be supposed to be therein, and to mine for and remove, from said lands, all coal and other minerals which may be found thereon by anyone.

Fourth: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from such prospect places or mines and for the convenient and proper operation of such prospect place, mines and for roads and approaches thereto or for removal therefrom of coal, mineral, machinery or other material."

The disputed reservation is contained in a 1909 deed issued pursuant to an 1899 contract of sale whereby the Railroad conveyed to Guilds' predecessors the subject lands and other lands. These lands are but a small portion of the twelve-million acre land grant stretching from Omaha, Nebraska, to Ogden, Utah, granted by Congress in 1862 (Act of July 1, 1862, 12 Stat. 489) and 1864 (Act of July 2, 1864, 13 Stat. 356) to the federally chartered Union Pacific Railroad

Company ("railroad company" or "original railroad") for the purpose of aiding in the construction of the railroad. Section 3 of the 1862 Act, which contains the basic grant, is set forth in the Appendix as Exhibit I. Section 3 also excepted from the grant "all mineral lands", and provided that all land grant lands not "sold or disposed of" within three years after the completion of the railroad would be thrown open to settlement and preemption, like other lands, at a price not exceeding $1.25 per acre to be paid to the railroad company. Section 4 of the 1864 Act doubled the size of the grant so that the railroad would receive ten instead of five alternate sections per mile on each side of the track and relaxed the exception of "all mineral lands" so as not to except "coal and iron lands". The "golden spike", signifying

the completion of the railroad, was driven in 1869 at Promontory Point, near Ogden, Utah.

The dispute over the ownership of the oil and gas in the subject lands arose in mid-1977 when Guilds would not sign a "Surface Owners Agreement" presented by Resources and Amoco covering the subject lands, whereby Guilds would in effect concede the oil and gas rights to Champlin and agree to take 2 1/2% of any production from the well proposed to be drilled thereon. After months of conferences and confrontation on the matter, Guilds advised Champlin and Amoco on October 4, 1977 that they would not sign the agreement and that Amoco was not to enter upon Guilds' lands and drill a well. On October 6, 1977, two days later, Amoco and Champlin entered into an oil and gas lease, novel in its terms and obviously

designed to protect both Champlin and Amoco against Champlin's title problem. Section 3 of the lease provided that the lease would automatically terminate if Amoco did not commence the drilling of a test well within three months from the date of the lease. Section 16, however, prohibited Amoco from drilling a well until the written consents of the "surface owners" in form satisfactory to Champlin had been obtained, and Section 10 provided that the lease would not be terminated for Amoco's failure to comply with any express or implied covenant of the lease for any cause beyond Amoco's control except financial.

On October 27, 1977, Amoco filed its complaint against Guilds initiating this action, alleging that under its lease with Champlin it had a right to drill a well on the subject lands, that Guilds would not

permit Amoco to enter upon the subject lands to drill a test well, and that unless Amoco were permitted to enter upon the lands immediately it would suffer irreparable damage because under paragraph 3 the lease would expire for failure to commence drilling within three months. The relief demanded in the complaint was for a temporary restraining order restraining Guilds from interfering with Amoco's entering upon the subject lands and drilling a test well, for a preliminary injunction to that effect "during the pendency of the action", for a "permanent injunction", and for other relief as might be just. The complaint did not mention paragraph 16 or 10 of the lease. Neither Resources nor Champlin were parties plaintiff in the original complaint and neither was made a party by Amoco. The complaint contained no allegation whatever that Champlin, or anyone

else, was the owner of the oil and gas estate even though Amoco's lease rights depended upon Champlin's ownership of the oil and gas, and made no request for adjudication of title thereto. The action at this point was for purely injunctive relief, neither tied to nor depending upon any substantive right to be determined or issue to be tried. It was, in petitioners' view, nothing more than at attempt by Amoco, acting as cat's-paw for the Railroad (the real party in interest), to seize upon the equitable procedural remedy of injunction as a device to obtain a de facto adjudication of title in Champlin's favor without a trial on the merits of that issue and the risk of an adverse determination. The complaint and excerpts from the oil and gas lease attached thereto are included in the Appendix as Exhibit J.

On October 27, the same day the complaint was filed, the District Court, in violation of the notice requirements of Rule 65, F.R.C.P., issued its Temporary Restraining Order (included in the Appendix as Exhibit K) against petitioners as demanded in the complaint and set Amoco's request for preliminary injunction for hearing in Cheyenne on November 3, four days after petitioners were served with process. At the hearing, which because of distance and prior commitments petitioners and their attorneys could not attend and could not obtain a postponement from respondents or the court, the court stated it had no doubt that the Railroad has reserved the minerals and informed respondents that they would not be delayed and could proceed as though they had a permanent injunction (R. Vol. VI, p. 31) even though as yet

there was no allegation of title and nothing for the court to try, and even though petitioners had not yet had a reasonable opportunity to even appear in court. The court's order giving petitioners ten days to submit memoranda in opposition to the entry of a permanent injunction and extending the temporary restraining order, was entered on the date of the hearing. It is reproduced in the Appendix as Exhibit L.

Petitioners instead filed motions to dismiss the complaint and to dissolve the restraining order. The motion to dismiss attacked the complaint for failure to state a claim against petitioners upon which injunctive or any other relief could be granted, for failure to join Champlin, Resources and the Railroad as indispensable parties purportedly the owners of the oil and gas estate upon whose title Amoco's lease rights depended, and because the lease itself

prohibited Amoco from drilling a well and exonerated it from doing so until Champlin had obtained the necessary written consents from the landowners. The motion to dissolve attacked the temporary restraining order as issued in violation of Rule 65, as being unsupported by factual allegations showing urgency, irreparable harm or inadequate remedy at law, and as drastically altering the status quo to petitioners' irreparable harm by permitting the drilling of a test well before the ownership of the oil and gas rights were determined by proper proceedings.

Under pressure from petitioners' motion to dismiss for failure to join indispensable parties, Resources and Champlin at the hearing on motions held in Casper on November 30, 1977, by separate pleadings entitled "Joinder, Adoption of Pleadings and Consent" (R. Vol.1,

pp. 59-62) filed without prior notice, joined Amoco as plaintiffs as alleged owners of the oil and gas estate, adopted Amoco's pleadings as their own, and consented that the action proceed as scheduled. Neither Resources or Champlin, however, raised the underlying substantive issue of the ownership of the oil and gas or requested an adjudication thereof in its favor. Thus, at the hearing, Resources, Champlin and Amoco were requesting pure injunctive action against petitioners authorizing Amoco to enter upon petitioners' lands and drill a test well so that Amoco would not lose its lease with Champlin for failure to drill within three months when Champlin itself could save Amoco's lease simply by extending the drilling deadline (if such there was) until the underlying issue of ownership could be determined by proper proceedings.

At this point respondents' case was exposed for the sham it was, and their case should have been thrown out and the restraining order dissolved on the spot.

Notwithstanding the posture of the case at this time, the court denied petitioners' motion to dismiss and to dissolve, continued the "temporary" restraining order in effect, gave petitioners ten days to file their answer, and ordered that all discovery be completed within 30 days, even though petitioners had advised the court that discovery could be tedious and time consuming and even though the ownership of the oil and gas had not yet been placed in issue. At the time of the hearing, the "temporary" restraining order had already been in effect for a month and Amoco was actively drilling what turned out to be, as petitioners had feared and repeatedly advised the court, a dry hole.

From that time on, the court was hardly in a position to fairly and impartially decide the case, for if it subsequently held that petitioners were the owners of the oil and gas estate, then the court would have irreparably harmed petitioners by the unlawful restraining order permitting the drilling of the dry hole which destroyed the value of the oil and gas rights. A holding in favor of respondents, on the other hand, would avoid that problem.

In their Answer and Counterclaim, reproduced in the Appendix as Exhibit M, petitioners reasserted the defenses raised in their motions to dismiss and to dissolve, and raised the abstention issue of whether the court should decline or defer the exercise of its jurisdiction and remit the parties to their remedies in the Wyoming courts. We believe the reasons for abstention set forth in the Answer are as valid

now as they were then. In their Counter-claim, petitioners raised for the first time the ownership issue and claimed the title to the oil and gas.

The foregoing sets out what petitioners believe to be only the beginning of a long list of grievances with the conduct of the proceedings in the trial court. Where, as petitioners set it, everything from beginning to end has been handled in a manner so arbitrary, unfair and prejudcial to petitioners' fundamental right to a fair trial before an impartial court, especially in light of their limited resources and the extreme inconvenience of the federal forum, it is impossible to set out and analyze all of the allegedly erroneous matters. They are treated in some detail in the portion of petitioners' trial memorandum and letters to the court attached to their Motion for

New Trial and included therewith in the Appendix as Exhibit D. They, together with the other issues and the documentary evidence bearing on the validity and construction of the reservation, were swept away as irrelevant in the courts below by the holding that the reservation unambiguously reserved the entire mineral estate, including oil and gas, as a matter of Wyoming law. We submit, however, that the manner in which the proceedings was conducted in the trial court, as set out in the attachments to petitioners' Motion for New Trial, have so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The evidence in the case is of necessity documentary, any witnesses to the transaction involving the contract and deed having died long ago.

Respondents' evidence consists of selected bits and excerpts from old government reports and other publications, photocopies of mining and placer claims and the like, and opinion testimony calculated to show that at the time in question there was oil activity in Uinta County, and that oil and gas were then generally and commercially understood to be "minerals". There is no dispute on these matters. Opinion testimony was also presented by respondents calculated to show that at around the turn of the century the ordinarily understood meaning of terms such as "mine" and "mines" included drilling operations and oil wells. This matter petitioners do dispute, and believe the testimony is swamped by the very documents introduced to support that testimony. It is questionable if it makes any difference in this case. Respondents introduced

not an iota of credible evidence as to the intention of the Railroad or the purchaser that the reservation should include oil and gas.

Petitioners' evidence consists of documents in the main gleaned from the self-serving documents produced by respondents from Railroad files. They are direct evidence establishing that before and at the time of the contract and deed and thereafter the Railroad did not and could not have intended to reserve oil and gas, and that the deed reservation was invalid in any event. The authenticity and accuracy of these documents are not challenged by respondents. They were ignored by both the District Court and the Court of Appeals.

To finance the construction of the railroad, the original railroad company twice mortgaged the land grant lands, first

by the "Land Grant Mortgage" of 1867 (Def. Ex. E) to secure the repayment of $10,700,000 in bonds, and second by the Sinking Fund Mortgage (not in the record) of 1873 to secure the repayment of $16,000,000 in bonds. The Sinking Fund Mortgage was made absolutely subject to the Land Grant Mortgage. The original railroad company was thereafter merged with two other railroads into the Union Pacific Railway Company ("Railway"), and the railroad company's interest in the land grant lands, subject to the mortgages, passed to the Railway by Deed of Consolidation executed in 1880 and recorded in 1904. The Sinking Fund Mortgage was subsequently foreclosed against the Railway in the 1890's, and the Railway's interest in the land grant lands, and the interest of the trustees of the Sinking Fund Mortgage, passed to the present Railroad by

Special Master's Deed of 1899, subject however to the Land Grant Mortgage which was not foreclosed.

The Land Grant Mortgage, unique in its terms is a great deal more than an ordinary mortgage or deed of trust. The mortgage expressly:

(a) conveys to the trustees all of the original railroad company's estate, right, title, interest, claim and demand whatsoever, in law or in equity, in the land grant lands;

(b) grants to the railroad "the sole and exclusive management and control" of the land grant lands, with "full power and authority to make contracts for the sale of same";

(c) provides that "no title to any tract of land, contracted to be sold by the [railroad], shall be given until the whole

of the purchase money of said tract shall be paid to the [trustees]. . ., and when any tract or parcel of said lands shall have been paid for, . . .the same shall be conveyed by the said [railroad] and said trustees in fee simple";

(d) provides that "whenever all of the lands. . .shall have been fully paid, the said trustees shall re-convey to said [railroad] all and singular the said lands then in the hands of the trustees, and not before that time sold or disposed of".

The Land Grant Mortgage was not released and discharged until 1904, by which time the subject lands had been sold but not yet conveyed by the present Railroad.

The Land Grant Mortgage is crucial to a proper understanding and resolution of this case. Whatever its understanding might have been at the time as to its ownership of the

minerals in the land grant lands, the original railroad in the mortgage conveyed its entire right, title, interest and estate in said lands, including minerals, fully understanding and intending that said lands would thereafter be sold and conveyed to outside purchasers or reconveyed by the trustees to the railroad if not sold or disposed of by the time the bonds were fully paid. The mortgage does not even suggest that the railroad might reserve to itself any minerals in lands it sold for the trustees to outside purchasers.

Clearly, then, the original railroad understood and intended that by conveying its entire interest in the land grant lands to the trustees of the Land Grant Mortgage, subject to resale requiring conveyance of fee simple title, any and all minerals which the railroad might have received in

the land grant lands would irretrievably pass from the railroad and the trustees to the purchaser when the land was sold, subject only to the possibility that the lands would be reconveyed by the trustees to the railroad should the purchaser default and the lands be not subsequently resold before the bonds were fully paid. It was with this understanding between the parties to the Land Grant Mortgage that the present Railroad, as successor in interest to the original railroad, sold the subject lands in 1899 while the mortgage was still in effect. And had the trustees, in 1904 when the mortgage was released and discharged, reconveyed as the mortgage required "all and singular the said lands then in the hands of the trustees, and not before that time sold or disposed of", the trustees could not have reconveyed the subject lands to the present Railroad as they had by that time already

been sold.

Just as clearly, all right, title, interest and estate in the land grant lands having passed under the Land Grant Mortgage to the trustees, the Railroad could not for the trustees sell these lands to outsiders while the mortgage was in effect and reserve to itself the minerals:

> An exception or reservation is void. . .where the grantor had no interest or estate in the thing excepted. 26 C.J.S. Deeds § 139a. (Emphasis added.)

That the mortgage trustees did not join in either the contract or the deed does not increase the rights of the Railroad or diminish the rights of the purchaser. The trustees were bound by the mortgage to honor the contract.

In Platt v. Union Pacific Railroad Company, 99 U.S. 48 (1879), this Court held that the Land Grant Mortgage was

itself a sufficient "disposal" by the original railroad to satisfy the requirements of Section 3 of the Act of 1862 (App. Ex. I) and thus to shield the land grant lands from settlement and preemption until the mortgage was discharged. Following the railroad's argument, the Court specifically observed that the mortgage "purports to convey to the trustees a fee, and not a limited estate, and it requires in all sales that may be made under it the conveyance of a fee". 99 U.S. at 62. The Court also reiterated that it was the public policy and the policy of the Act of 1862 to provide for the settlement of the lands by actual settlers and to guard against the accumulation of large bodies of land in single hands.

The original railroad having in Platt saved the land grant from settlement and preemption (for itself and the Railroad as

its successor) by successfully arguing that under the mortgage it had conveyed a fee to the trustees and was required to convey a fee to purchasers, the Railroad is not now in a position to claim under any theory that it could sell the lands for the trustees to outside purchasers and reserve the minerals to itself.

The Land Grant Mortgage itself, we feel, is conclusive against respondents' assertion in this action that they own the oil and gas in the subject lands. However, it was not discussed by the courts below.

On April 21, 1899, a month before entering into the contract with the Railroad for the purchase of the subject lands, C. L. Byrne, the purchaser, executed the Railroad's printed "Application for Lands" form (Def. Ex. C). It indicates that $48.00, or ten percent of the purchase price, was

forwarded with the Application to the Railroad and that the remaining balance was to be paid in annual installments over a ten-year period. In the center of the page is printed an exception and reservation clause of great importance:

> "For which it is agreed that the contract or deed of sale shall not apply to any coal that may be underneath the surface of the land herein described, but that the coal shall be the exclusive property of the Railroad Company, and it shall have such right of way and ground free of cost, as shall be necessary for the proper working of any coal mines that may be developed upon said premises, and for the transportation of the coal from the same. (Emphasis added.)

The reservation clause in this simple and readily understood form is expressly limited to coal. The purchaser could only have understood that he was purchasing the entire fee except for coal. The Railroad, except in bad faith, could hardly have understood otherwise. Certainly, this clause

is not consistent with the idea that by subsequently entering into a contract reserving "coal and other minerals" and the right to "mine" the same from "mines" it was intended by the parties that the Railroad should increase its reservation to the entire mineral estate, especially to oil and gas not obtained by "mining" methods from "mines" as those terms are ordinarily understood.

Having received Byrne's down payment with his Application on a form it printed and presented to him, the Railroad had some obligation to return his money or enter into a contract at least not in conflict with the provisions of the Application. Instead, the Railroad presented Byrne with the 1899 contract, not in accordance with the simply and clearly stated provisions in the Application, but in lengthy, confusing

and ambiguous language and reserving to the Railroad "all coal and other minerals" and hard rock mining rights.

The Railroad maintained books in which it recorded at the time relevant information as to each deed it issued. Page 193 of one of these books (Def. Ex. G) contains the record of the 1909 deed to the subject lands. Under the "Reservation" column pertaining to the deed in question is the entry "Coal & 400 ft. R/W & fence" which is written in dark ink with a broad-tipped pen. Above this entry, after the word "Coal", in much lighter ink and obviously different hand-writing are the words "and other minerals". It is established from the deposition of Harry A. Swanson, a railroad clerk at the time, taken in another case (Def. Ex. H), that in about the year 1919 the words "and other minerals" were added by him and

other clerks after the word "Coal" in the Reservations column of the deed record books.

Page 193 records the terms of 15 deeds issued by the Railroad to land grant lands in four different states -- Utah, Colorado, Nebraska and Wyoming. In the "Reservations" column to five of these deeds the word "Coal" is written, in each case with the words "and other minerals" added. In the "Reservation" column to two other deeds the words "Oil and coal" are written, in each case without the words "and other minerals" being added. From the "Taxes Since" column we can ascertain that in 1902 the Railroad began changing its contract reservations from "coal and other minerals" to "oil, coal and other minerals", and that in the year 1909, when the deed in question was issued, the Railroad was simultaneously issuing two different forms of deeds, one reserving "coal and

other minerals" and the other reserving "oil, coal and other minerals", side by side. On the face of it, it strikes us as almost ridiculous for the Railroad to contend that both reservations were used by it with the intention to reserve oil and gas.

The trial court, contrary to its statement at pretrial, rejected at trial as irrelevant petitioners' Exhibit I (R. Vol. X, p. 62), a certified copy of the case file in Callister v. Union Pacific Railroad Company, a 1928 case brought by petitioner against the Railroad challenging the sufficiency of a 1907 Railroad deed reservation identical to the reservation at bar to reserve oil and gas. The case is not important for its decision, as there was none. It is important because it reflects the Railroad's attitude as late as 1929

toward its "coal and other minerals" reservation, and because of its own assertions that the reservation was ambiguous as reserving oil and gas.

The petition in substance alleged that in 1898 the Railroad contracted with plaintiff's predecessors to sell the lands there in question, the contract containing a "coal and other minerals" reservation expressly understood by the parties not to include oil and gas; that upon payment of the contract the Railroad issued a deed reserving "oil, coal and other minerals" which the purchasers refused to accept as contrary to the contract and the understanding of the parties; that the Railroad thereupon in the same year issued a new deed reserving "coal and other minerals"; that in 1927 the Railroad, in violation of plaintiff's rights as the purchasers' successor to the oil and

gas estate issued an oil and gas lease on said lands to Frank Wilcox, who thereupon drilled a producing well and extracted oil therefrom to plaintiff's irreparable harm. Plaintiff prayed for an adjudication of herself as owner of the oil and gas estate and for an injunction and an accounting.

Almost three months later, without answering the petition, the Railroad filed its Separate Motion to Make the Petition More Definite and Certain. The Separate Motion admitted the "coal and other minerals" deed, alleged the petition attempted to construe the deed by drawing conclusions from negotiation and correspondence between the parties which could not be drawn from the facts alleged in the petition, and requested the Court to require plaintiff to set forth the correspondence between the parties prior to the contract and there-

after, to the end that the Court might draw therefrom the proper conclusions instead of those drawn by plaintiff. More than two months after the Railroad's separate Motion was filed, the parties stipulated that the matter was finally settled and the case could be dismissed with prejudice, which it was.

The Callister case was an obvious menace to the Railroad's assertions developed after Burke v. Southern Pacific Railroad Company, infra, 234 U.S. 660 (1914), that its "coal and other minerals" reservation reserved not just the coal but the entire mineral estate, including oil and gas. Plaintiff apparently had the documentary evidence to prove the Railroad's duplicity and establish the understanding of the parties that the "coal and other minerals" reservation was not to include oil and gas.

The railroad could not, it seems, afford to let the case go to trial, and so it settled out of court.

The Railroad's expert handling of the Callister case could not hide the fact that when it first acted on its belated assertions that its "coal and other minerals" reservation included oil and gas, it backed off in court and settled the case without even attempting to advance its present assertions. The Railroad had then and there the opportunity to settle the question for all time in Wyoming. If it was at that time as sure of its "coal and other minerals" reservations as appellees claim to be now, it would have had no apprehension about a judicial determination. In fact, if the railroad was as sure then as respondents claim to be now that its "coal and other minerals" reservations unambiguously reserved the entire mineral

estate as a matter of Wyoming law, it might more properly have demurred or moved for summary judgment and resisted, rather than demanded, the production of petitioners' extrinsic evidence of intent. That the Railroad chose the course it did is revealing.

And by demanding in its Separate Motion that plaintiff be required to set forth her documentary evidence of intent (the correspondence) "to the end that the court may draw therefrom the proper conclusion", the Railroad not only admitted, it actually asserted, that its "coal and other minerals" reservations were at best for it ambiguous as reserving oil and gas and that extrinsic evidence was necessary to their proper construction. If these reservations were ambiguous then they are ambiguous now and should be so declared. Fifty years of delay

by the Railroad in again raising the issue, so that time might work its magic, should not alter that very significant fact.

There is yet other evidence that the Railroad did not assert or even consider its "coal and other minerals" reservations to include more than coal, or solid minerals at most, until after Burke v. Southern Pacific Railroad Company, supra, 234 U.S. 660 (1914), when this Court held for the first time that the issuance to a land grant railroad of a patent to land grant lands constituted a conclusive adjudication by the government that the patented lands were not "mineral lands" excepted from the grant, and that with the patent the entire fee, including all minerals, passed to the railroad free of the "mineral lands" exclusion contained in Section 3 of the Act of 1862 and in the patent intself.

The Railroad first began in 1917, voluntarily it appears, to pay taxes on its claimed "mineral reserves" in an apparent attempt to establish some sort of color of title or claim of right to the mineral estate in land grant lands sold under the Land Grant Mortgage, to the end that, with the passage of time, it would hopefully recapture the minerals which before Burke it could not have been sure it ever owned and which passed with the lands when sold to outside purchasers.

In a 1917 letter from J. W. Griffith, the Railroad land commissioner, to A. W. Scribner, the Railroad tax commissioner (Def. Ex. F, pg. 2), Griffith advised that the coal reservations in three sections of land grant lands in Uinta County had previously been released by quitclaim deed, and that the tax commissioner should have said

lands stricken from the "mineral reserves" tax list and obtain a refund for 1917 taxes paid. The only plausible explanation for Griffith's action is that he himself considered the Railroad's "coal and other minerals" reservation to reserve only the coal and that when the coal reservation was released the Railroad had no other minerals to pay taxes on.

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REASONS FOR GRANTING THE WRIT

1. The decision below holding as a matter of Wyoming law that the reservation unambiguously reserves the entire mineral estate including oil and gas is in conflict with the uniform law of the other states and excludes from consideration, as irrelevant, (1) petitioners' documentary evidence establishing as a fact that at the time of the contract and deed the Union Pacific did not and could not have intended to reserve oil and gas and there is no evidence to the contrary, and (2) such fair trial issues as denial of discovery, inadequate notice and

> opportunity to prepare their case, inconvenience of the federal forum, irreparable harm from unauthorized restraining order, and lack of impartiality of the trial judge.

In affirming the District Court and holding the reservation at bar to unambiguously reserve the entire mineral estate including oil and gas as a matter of Wyoming law, the Court of Appeals purports to apply the majority rule, which all parties and the courts below agree the Wyoming Supreme Court would follow if deciding the case. Actually, however, the court has ascribed to the State of Wyoming and applied to the reservation an extreme rule of property law not in force in any other state.

It is agreed by all that under the broad majority rule the term "minerals", standing alone without qualification, when used in a conveyance between private parties where their intention controls, will be construed

to unambiguously include oil and gas and the entire mineral estate as a matter of law. This aspect of the majority rule is in accordance with the ordinarily understood meaning of the term "minerals" as including every substance legally cognizable as a mineral. There is no dispute on this. It is only under the minority Pennsylvania and Arkansas rules that such an unqualified use of the term "minerals" will be construed to be ambiguous per se and presumptively not to include oil and gas, and it is agreed by the parties and the courts below that the Wyoming Supreme Court would not follow either of these minority rules.

The result under the majority rule is different, however, when a private party grant or reservation of "minerals" is qualified by other language in the instrument -- as in the reservation at bar by the coupling

of a specified hard mineral substance (coal) with "other minerals", and by expressly providing for the right to "mine" such coal and other minerals from "mines". It is the universally recognized rule, rooted in common experience and perception, that the ordinarily understood meaning of terms such as "mine", "mines" and "mining" does not include drilling operations or wells.[1/]

1/ Many of the majority rule cases interpreting private party conveyances involving "minerals" cited in footnote 2, infra, expressly state that the ordinarily understood meaning of "mine" and "mines" and the like do not include drilling and wells. See also, 40 C.J. Mines and Minerals § 7 p. 735; 36 Am. Jur. Mines and Minerals § 2. Other cases in contexts other than private party transactions holding the ordinarily understood meaning of "mine", "mines" and the like not to include wells or drilling operations (or quarrying operations) are: Marvel vs. Merritt, 116 U.S. 11, 12 (1885); Ozark Chemical Co. v. Jones, 125 F.2d 1, 2 (10th Cir. 1952), Lambert v. Pritchett, 284 SW2d 90 (Ky. 1955) Barton v. Wichita River Oil Co., 187 S.W. 1043 (Tex. Civ. App. 1916); Kreps v. Brady, 133 P. 217 (Okla. 1913); Fremont Lumber Co. v. Starrel Lumber Co., 364 P.2d 773 (Ore. 1961); J. M. Guffey Petroleum Co. v. Murrell, 53 So. 705 (La. 1910); Carter v. Phillips, 212 P. 747 (Okla. 1923);

Thus, when the terms "minerals", "mine" and "mines" are used together in a private party grant or reservation, as in the reservation at bar, without at the same time including other apt or suitable language showing an intention to include oil and gas, the term "minerals" as so used becomes ambiguous as including oil and gas,[2] and resort must then

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1/ Hollingsworth v. Berry, 192 P. 763 (Kan. 1920); Cornwell v. Buck & Stoddard, 82 P.2d 516 (Cal. App. 1938); Cortelyou v. Baker, 187 P. 417 (Cal. 1920); Kinder v. LaSalle County Carbon Coal Co., 141 N.E. 537 (Ill. 1923).

2/ Detlor v. Holland, 40 N.E. 690 (Ohio 1898); McKinney's Heirs v. Central Kentucky Natural Gas Co., 120 S.W. 314 (Ky. 1909); Hudson & Collins v. McGuire, 223 S.W. 1101 (Ky. 1920); Sellars v. Ohio Valley Trust Co., 248 SW2d 897 (Ky. 1952); Western Development Co. v. Nell, 288 P.2d 452 (Utah 1955); Huie Hodge Lumber Co. v. Railroad Lands Co., 91 So. 676 (La. 1922); Rhomberg v. Texas Co., 40 NE2d 526 (Ill. 1942); Nance v. Donk Bros. Coal & Coke Co., 151 NE2d 97 (Ill. 1948); Monon Coal Co. v. Riggs, 56 NE2d 672 (Ind. 1944). The above cases involve only oil and gas and "mining" rights. There are any number of other cases holding the term "minerals" with "mining" rights not to include substances taken by quarrying.

be had to extrinsic evidence of intent and surrounding circumstances to resolve the ambiguity and the burden of proof is on the party choosing the ambiguous language.[3/] This is the uniform holding of the majority rule cases (excepting Pennsylvania and Arkansas) and there is no minority rule to the contrary,

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3/ 17 A C.J.S. Contracts § 324; DeWitt v. Berry, 134 U.S. 306, 314-315; Tauer v. Williams, 242 P.2d 518, 525 (Wyo. 1952); Chevron Oil Co. v. Barlow, 406 F.2d 687, 692 (10th Cir. 1969); Kentucky Diamond Mining and Development Co. v. Kentucky Transvaal Diamond Co., 132 S.W. 397, 399 (Ky. 1910); Detlor v. Holland, 40 N.E. 690, 692 (Ohio 1898); Radke v. Union Pacific Railroad Co., 334 P.2d 1077, 1078 (Colo. 1959); McCombs v. Stephenson, 44 So. 867, 869 (Ala. 1906); Horse Creek Land and Mining Co. v. Midkiff, 95 S.E. 26, 27 (W. Va. 1918); Beury v. Shelton, 144 S.E. 629, 633 (Va. 1928); Light v. Crowson Well Service, Inc., 313 So.2d 803, 808 (La. 1975); Bundy vs. Myers, 94 A.2d 724 (Pa. 1953); Witherspoon v. Campbell, 69 So. 2d 384, 386 (Miss. 1954); Dewell v. Federal Land Bank of Wichita, 380 P.2d 379, 381 (Kan. 1963); Campbell v. Tennessee Coal, Iron & R. Co., 256 S.W. 674, 676 (Tenn. 1924); Walters v. Ellis, 312 SW2d 231, 234 (Tex. 1958); Patterson v. Wilcox, 358 P.2d 88, 91 (Utah 1961); Puget Mill Co. v. Duecy, 96 P.2d 571 (Wash. 1939); White v. Miller, 92 N.E. 1065, 1067 (N.Y. 1910)

whether or not the term "minerals" is further qualified by coupling with it a specified hard mineral substance. If, however, the term "minerals" is qualified both by coupling a specified hard mineral substance with "other minerals" and by express hard rock mining rights of the type by which the specified hard mineral substance (but not oil and gas) is recovered, the cases construing that type of grant or reservation expressly recognize the coupling of the hard mineral substance with "other minerals" as an additional qualification.[4/] The reservation at bar, under the uniform rule of the other states is thus doubly qualified and ambiguous as reserving oil and gas.

4/ E.g., Western Development Co. v. Nell, 288 P.2d 452 (Utah 1955); Sellars v. Ohio Valley Trust Co., 248 SW2d 897 (Ky. 1952); Huie Hodge Lumber Co. v. Railroad Lands Co., 91 So. 676 (La. 1922).

The Court of Appeals did not discuss the case law of the other states or the rule pertaining to the construction of private party grants or reservations of "minerals" when qualified as in the reservation at bar, stating only on this point that "The parties have relied on decisions from other states in support of their positions on this question of Wyoming law." 636 F.2d 265. The court instead referred to "Wyoming statutory and constitutional provisions said to include petroleum among those resources taken from 'mines'", but which actually refer to mining claims under the mining and tax laws and have not the remotest application to a private party grant or reservation of "minerals" qualified by hard rock mining rights. In holding the doubly qualified reservation at bar to unambiguously reserve the entire mineral estate including oil and gas as a matter of Wyoming law, the court

relied primarily upon the recent Wyoming case of Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979). Coronado held, in light of the legislative purpose and public policy of facilitating the development of Wyoming's resources, that the word "mining", and the word "mine" in the phrase "mine truck haul road", as contained in a Wyoming right of way condemnation statute, would be construed so as not to exclude from its reach the condemnation of ways of necessity for oil and gas exploration purposes. For those purposes, the words "mining" and "mine" as used in the statute were held to include exploration for oil and gas and oil wells. Coronado did not purport to rule that those terms would be held to include oil and gas exploration operations and oil wells in any context, nor did it purport to rule upon the qualifying effect of the terms "mine" and "mines" as

used in a private party grant or reservation of "minerals" or of "coal and other minerals." The word "minerals" was not even involved in Coronado.

The Court, while recognizing that Coronado was not a controlling expression of state law on the issue of the interpretation of the reservation at bar, nevertheless states Coronado to be "persuasive and entitled to consideration by this Court" because the Wyoming Supreme Court felt that its construction of the term "mining" was "hardly unique or expansive of that term". The court takes this statement to be an expression by the Wyoming Supreme Court that its interpretation of the term "mining" as used in the statute was the "ordinary and natural" meaning of that term. On that basis, the court states its belief that the Wyoming Supreme Court would also hold the reservation at bar to unambiguously reserve the oil and gas,

notwithstanding the references to "mines" or "mining" contained therein. 636 F.2d at 265-266.

Petitioners are unable to agree that the Wyoming Supreme Court in Coronado held or even stated that the construction it gave the statutory term "mining" as including oil and gas exploration was the "ordinary and natural" meaning of that term. To do so would be to ascribe to words such "mining", "mine", and "mines" an ordinarily understood meaning in Wyoming wholly at odds with the ordinarily understood meaning of those terms in the rest of the nation as not including oil and gas drilling operations and wells. For the Wyoming Supreme Court to hold a private party grant or reservation involving "minerals", when qualified by other language as in the reservation at bar, to unambiguously reserve the entire mineral estate

including oil and gas would be not only to completely abandon the uniform rule of the other states to the contrary and lay down for the State of Wyoming an extreme rule of property law not in force in any other jurisdiction, but also to abandon the actual, true intention of the parties as controlling in the interpretation of instruments between private parties. For if a court ascribes to words as used in agreements between private parties to express their intention a meaning different from the ordinarily understood meaning of those words, then the court is in effect enforcing not the agreement intended by the parties but instead the court's own arbitrary construction of those words and the fixed legal meaning it has given to ambiguous language in order to dispose of a case "as a matter of law." It is inconceivable that the Wyoming Supreme Court would completely

abandon the majority rule and the actual intent of the parties as controlling, especially when that Court has always looked to the actual intent of the parties to the transaction as controlling and has not hesitated to resort to extrinsic evidence to ascertain that intent when it does not readily appear from the language of the instrument itself.5/

And if it is the actual intention of the parties to the transaction that controls, it really should not matter what might be the ordinarily understood meaning of the terms

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5/ Snow v. Duxstad, 147 P. 174 (Wyo. 1915); Pacific-Wyoming Oil Co. v. Carter Oil Co., 226 P. 193 (Wyo. 1924); Houghton v. Thompson, 115 P.2d 654 (Wyo. 1941); Picard v. Richards, 366 P.2d 119 (Wyo. 1961); Goodman v. Kelly, 290 P.2d 244 (Wyo. 1964); Mauch v. Ballou, 499 P.2d 591 (Wyo. 1972); Dawson v. Meike, 508 P.2d 15 (Wyo. 1973); Bard Ranch, Inc. v. Weber, 538 P.2d 24 (Wyo. 1977)

"mine" and "mines" in Wyoming at the time of the deed. The Railroad's contracts and deeds, on printed forms, were not drafted or prepared in Wyoming, but in Omaha, Chicago, New York or other places back east and presented to purchasers in Wyoming and other states on a "take it or leave it" basis. The Railroad lawyers who drafted these instruments could not have had in mind what the ordinarily understood meaning of the terms "mine" and "mines" might have been in Wyoming at that time, and certainly they assumed, if they ever thought of the matter, that those terms would have the same meaning the country over and the same legal effect wherever used.

It is especially unjust and erroneous in this case to hold, by forced construction of words, that the reservation at bar includes the entire mineral estate "as a matter of law", when to do so covers over and excludes

from consideration the facts and circumstances which so clearly establish that at the time the Railroad could not and could not have intended to reserve the oil and gas, and lends high judicial sanction to a great injustice never intended by the Congress, the Executive Branch, the United States Supreme Court, the outside purchasers of land grant lands, or at the time even by the Railroad and its predecessors. Even more is it inconsistent to hold the reservation unambiguous when the Wyoming Supreme Court would undoubtedly recognize it as being ambiguous simply because of the great volume of litigation over mineral grants and reservations of the type here. First National Bank and Trust Company vs. Finkbiner, 416 P.2d 224, 228 (Wyo. 1966).

The parties and the courts in this case are all agreed that the majority rule is the

proper standard to be applied in the construction of the reservation at bar. That rule looks to the actual intention of the parties to the transaction as controlling and gives to the words they use to express that intention their ordinarily understood meaning as the parties must be presumed to have understood them. To give those words different meaning because of Coronado-type cases is to depart from the majority rule and adopt in its place an extreme rule of property law which the Wyoming Supreme Court has not sanctioned and which is not in force in any other state. It is submitted that if the majority and uniform rule (agreed by all as the standard to be applied in this case) and the actual intention of the parties to the transaction do not for some reason impossible to perceive apply in Wyoming because of Coronado, that immensely significant fact should

first be stated by the Wyoming Supreme Court, not the federal courts.

By holding also that petitioners received a fair trial because after trial they were given time to make their legal arguments, the Court of Appeals has condoned as irrelevant unfair and arbitrary practices extremely prejudicial to petitioners' most fundamental rights to a fair trial before an impartial court. By denying petitioners their necessary discovery and time to develop their own evidence, the trial court has locked from view nearly a century of Railway and Railroad history, misconduct and misrepresentations calculated to obtain for itself a virtual monopoly in twelve million acres of minerals never intended by the Congress, the government, the courts, the outside purchasers, or at the time by the Railroad itself, and in violation of the

Congressional and public policy against the accumulation of large bodies of land in single hands.

It should be observed that if the decision below is allowed to stand, the Railroad can, chunk by chunk, obtain clear title to all lands covered by its reservations simply by initiating in or removing to the Wyoming federal district court case after case and running them through on the authority of the decision of the Court of Appeals in this case. Thus, the truth will never be brought to light and the Railroad will achieve its objective.

2. The courts below erred in failing to hold the reservation to be void because the Union Pacific had no title of its own out of which to carve a reservation at the time the lands were sold and was prohibited by the Land Grant Mortgage from doing so.

Both of the courts below failed to treat and completely ignored petitioners'

contention that the reservation was void because at the time it sold the subject lands for the trustees the Railroad had no title of its own out of which to carve a mineral reservation and because under the conditions of the Land Grant Mortgage the Railroad was required to sell and convey title in fee simple to purchasers.

Even if the reservation is unambiguous, and even if evidence bearing on its construction is irrelevant for that reason, the parol evidence rule "does not, or course, prevent the respondents [herein petitioners] from showing that the contract entered into was in fact not a contract, or that it was void or voidable for some other reason recognized by law." Bushnell v. Elkins, 245 P. 304, 307 (Wyo. 1926). In our view, the courts below committed error in failing to treat petitioners' contention and, we believe, holding the reservation to be void.

In the companion case soon to be discussed ("Guild II"), with identical and additional issues, the Wyoming federal district court has held that petitioners were precluded by collateral estoppel from relitigating the reservation in that case because it was fully litigated in the instant case, and the Court of Appeals has in the instant case not only upheld the district court's decision but has also held that petitioners received a fair trial. Thus petitioners might be precluded by collateral estoppel from litigating the validity of the reservation in Guild II even though the Court of Appeals did not rule upon or even discuss that issue in its opinion in the instant case.

3. The Court of Appeals erred in refusing to consolidate the instant case with a companion case before that court between the same parties and involving the same issues.

In the companion case of Guild Trust v. Union Pacific Land Resources Corp., 475 F.Supp. 726 (D. Wyo. 1979), appeal docketed No. 79-1568 10th Cir. ("Guild II"), filed by petitioners in the District Court of Uinta County, Wyoming, on March 8, 1978, additional matters bearing on the validity and construction of the reservation were raised for the first time on appeal in Guild II, which petitioners could not raise in the instant case because of denial of discovery and lack of time to prepare. Petitioners have admitted in Guild II that some of the identical Railroad deed reservations at issue there were issued pursuant to Railway contracts with a different type "coal and other minerals" reservation which was held in Radke v. Union Pacific Railraod Company, 334 P.2d 1077 (Colo. 1959) not to reserve any minerals at all but only a revocable

license. This buttresses substantially petitioners' argument in the instant case that the reservation is ambiguous, for what unambiguous meaning can be given to identical deed reservations issued pursuant to drastically different contract reservations. In Guild II, respondents have now alleged that the Railroad received its mineral titles from the "mortgage trustees", meaning the Land Grant Morgage trustees, and thus establishes petitioners' argument that at the time of the 1899 contract in the instant case the Railroad had no minerals to reserve. Yet notwithstanding that the identical deed reservations in both cases are clearly invalid and do not in any event unambiguously reserve oil and gas, the district court has held in Guild II that petitioners are collaterally estopped from relitigating the reservation in that case because it was fully litigated in the

instant case, and the Court of Appeals has in the instant case not only upheld the district court's decision but also held that petitioners received a fair trial. Thus petitioners might be collaterally estopped in Guild II and these new matters excluded from consideration in both cases.

4. The federal courts should abstain from exercising their jurisdiction in this case and remit the parties to the Wyoming courts for their remedies.

Without citation of authority at this time due to space and time problems, petitioners believe that the special circumstances exist in this case to justify and mandate abstention by the federal courts until the controlling and unsettled Wyoming law is formulated by the Wyoming Supreme Court. There are no cases in the Wyoming courts at this time where an early formulation can be obtained only because respondents have removed all such cases to the Wyoming

federal district court. Two non-removable cases filed by the State of Wyoming against respondents and the Railroad have languished for years, no doubt awaiting further action at the Railroad's pleasure. If the decision of the Court of Appeals in this case stands and the conduct of the proceedings in the district court are therefore approved, the situation might be ripe for a take over.

Either the Wyoming Supreme Court will sometime rule on this matter or the issues present in this case will never be settled. There are simply too many landowners, too many minerals, and too much value. If the Wyoming Supreme Court is going to eventually rule in any event, the sooner it does so the better. This will probably happen only if the federal courts abstain, for otherwise respondents will undoubtedly continue to remove all landowner suits to federal district court. Respondents, because of

their size, their influence and especially their non-residence for diversity purposes, are in a position to control the forum selection process until this Court does something about it, and by funneling all cases at its pleasure into the Wyoming federal district court, and on the authority of the decision of the Court of Appeals in this case, capture by unfair summary proceedings in the federal courts the great bulk of the minerals in the Wyoming land grant lands without the Wyoming Supreme Court having ever spoken. We would look forward to an opportunity to brief the issue.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES D. PHILLIPS
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Evanston, Wyoming 82930
Counsel for Petitioners

APPENDIX

App. 1

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

Denver, Colorado 80294

Heard September 17, 1980

Before

Hon. ROBERT H. McWILLIAMS, Circuit Judge
Hon. JAMES K. BARRETT, Circuit Judge
Hon. LUTHER L. BOHANON, District Judge*

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs-Appellees,

No. 79-1236 vs.

GUILD TRUST, ET AL.,

Defendants-Appellants.

Appeal from the United States
District Court
For the District of Wyoming
D.C. No. C-77-215
Ewing P. Kerr, Judge

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*The Honorable Luther L. Bohanon of the United States District Courts for the Northern, Eastern and Western Districts of Oklahoma is sitting by designation.

Guild Trust and others (hereinafter "Guild Trust") appeal from a District Court judgment which declared that appellees Amoco Production Company and others (hereinafter "Amoco") hold title to the entire mineral estate in certain lands in southwestern Wyoming, and which enjoined Guild Trust from interfering with Amoco's reasonable enjoyment of its rights in the mineral estate. See Amoco Production Co. v. Guild Trust, 461 F.Supp. 279 (D. Wyo. 1978).

The facts are thoroughly stated in the District Court opinion. Briefly, the Union Pacific Railroad Company in 1909 conveyed by deed the surface of some of its "checkerboard" lands received as grants from the United States Government to the Railroad in the mid-1800's. The Railroad reserved to itself "[a]ll coal

and other minerals within or underlying said lands", and associated rights of entry and surface use.[1] Amoco is the successor in interest to the Railroad's reserved mineral estate, while Guild Trust is the owner of the surface estate. The principal issue in the case is

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[1]The reservation in the deed reads:

Excepting and reserving to said Pacific Railroad Company, its successors and assigns,
First: A strip of land two (200) hundred feet wide on each side of the center line of the railroad of said Union Pacific Railroad Company as said road is now constructed over and across said land.
Second: All coal and other minerals within or underlying said lands.
Third: The exclusive right to prospect in and upon said land for coal and other minerals therein, and to mine for and remove, from said land, all coal and other minerals which may be found thereon by any one.
Fourth: The right of ingress, egress, and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from such prospect places or mines, and for the convenient and proper operation of such prospect places, mines and

whether the reservation of "coal and other minerals" includes the oil and gas.

Although the District Court allowed Guild Trust to present evidence at trial bearing on the actual intent behind the reservation language, the Court ultimately decided that the reservation must be interpreted without resort to extrinsic evidence. The Court noted that the Wyoming Supreme Court has not been called upon to rule whether a reservation such as that involved in this case is unambiguous and includes oil and gas. The Court thereupon examined state and federal case law, treatises, and other authorities. It concluded that the great weight of authority holds that a reservation of

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for roads and approaches thereto or for removal therefrom of coal, mineral, machinery or other material.

coal and other minerals includes oil and gas as a matter of law. The Court determined at least implicitly that the majority rule is also the controlling law in Wyoming. Applying the parol evidence rule, the Court held that the deed language reserving "coal and other minerals" to the Railroad is not ambiguous, and that the oil and gas was reserved to the Railroad and its successors, appellees herein, as "other minerals".

The District Court considered and rejected the minority Pennsylvania and Arkansas rules. The Pennsylvania rule is that the term "mineral" does not include oil and gas unless the language in the instrument indicates an intent to include those specific resources. The Arkansas rule requires extrinsic evidence of intent as to whether a reservation of "minerals"

reserves the oil and gas. The Court concluded from the authorities that the Pennsylvania and Arkansas rules have not been followed in the West.[2] There is substantial support of the District Court's conclusion. "There is very limited authority for the proposition that the term 'minerals' is ambiguous as to

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[2] Apparently Oklahoma follows the Pennsylvania rule. See Sloan v. Peabody Coal Co., 547 F.2d 115 (10th Cir. 1977), upholding the district court's determination that under Oklahoma law a reservation of "oil, gas and minerals" is unambiguous and excludes coal on the principle of ejusdem generis.

Kansas seems to follow the Arkansas rule, in that importance is attached to the substance of the transaction and the relative positions of the parties thereto. See Wulf v. Shultz, 508 P.2d 896 (Kan. 1973); Davis v. Plunkett, 353 P.2d 514 (Kan. 1960); and Hans v. Great Bend Brick & Tile Co., 241 P.2d 475 (Kan. 1952). Kansas decisions also have applied the rule of ejusdem generis. See Wulf v. Shultz, supra ("natural gas, petroleum, and other mineral substances" does not include limestone, the removal of which would destroy the surface estate); and Keller v. Ely, 391 P.2d 132 (Kan. 1964) ("gas, oil and mineral rights" does not

whether or not oil and gas are included or excluded and hence extrinsic evidence may be admitted to resolve the ambiguity." Williams and Meyers, Oil and Gas Law, Vol. I, § 219.4 (1978). This turns upon the presence or absence of a presumption as to the meaning of the term "minerals". Thus, the presumption in Pennsylvania is that the term "minerals" does not include oil and gas, but such presumption may be rebutted. Bundy v. Myers, 94 A.2d 724 (Pa. 1953). "Although there is some limited authority in a few states that the term 'minerals' does not include oil and gas, by the clear weight of authority, a grant or reservation, or lease of 'minerals' includes oil and gas unless other

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include rights to gypsum). It is uncertain whether the Kansas courts would find that oil and gas are akin to coal under the rule of ejusdem generis.

language in the instrument so restricts the definition of the term as used by the parties as to exclude these natural resources." Williams and Myers, Oil and Gas Law, Vol. I, § 219.1 (1978). See also: Burke v. Southern Pacific R.R. Co., 234 U.S. 669 (1914) and Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931) for the proposition that oil and gas (petroleum)has long been popularly regarded as a mineral oil and treated as a mineral.

When there are no controlling state decisions providing clear precedent, the views of the resident district judge on matters of state law carry extraordinary force on appeal. Obieli v. Campbell Soup Co., 623 F.2d 668, 670 (10th Cir. 1980); Farmers Alliance Mut. Ins. Co. v. Bakke, 619 F.2d 885, 888 (10th Cir. 1980); Rasmussen Drilling, Inc. v. Kerr-McGee

Nuclear Corp., 571 F.2d 1144, 1148 (10th Cir. 1978), cert. denied, 439 U.S. 862 (1978). We agree with the District Court's conclusion that, in Wyoming, the reservation of "coal and other minerals" is unambiguous and includes oil and gas. The District Court's analysis of the issue is adopted by this Court:

> Professor Hemingway in "The Law of Oil and Gas" § 1.1 (1971) states the proposition:
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> "In perhaps a majority of states, a conveyance or reservation of the 'minerals' will include oil, gas and petroleum products, unless a contrary intent is manifested on the face of the instrument." See also 1A Summers, The Law of Oil and Gas § 135 (1954):
>
> "It is a general rule adhered to by a majority of the courts, that a conveyance or exception of minerals includes oil and gas, unless from the language of the instrument, or from the facts and circumstances surrounding the parties at the time of the execution, it is found that the term was used in a more restricted sense."
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> * * * *

. . .Pruitt makes clear in his article, "Minerals Terms--Some Problems In Their Use and Definition", Eleventh Annual Rocky Mountain Mineral Law Institute 1, 12 (1966), that the federal laws referring to "minerals" have:

"[f]rom an early date . . . been very broadly interpreted to include virtually every known substance found in the earth which has sufficient value to warrant the cost of its extraction. It is not surprising, therefore, that the Western states . . . have adopted broad, all-inclusive interpretations of the term "minerals" in contrast to the sometimes narrow interpretations adopted in the midwestern and eastern states."

While the courts in Wyoming have not been called upon to determine whether a reservation or grant of "minerals" includes oil and gas, Wyoming law has always considered oil and gas to be minerals and to be part of the mineral estate. Territorial statutes enacted in 1888 grouped petroleum with other minerals. The State's Constitution also classified oil with other minerals, Section 3 of Article 15 provided for the taxation of mines and mining claims, including those for oil.

An 1895 Wyoming Supreme Court decision reviewed a criminal conviction under Section 10 of the 1888 territorial statute, the culprit

having destroyed a building on an oil placer mining claim site. Van Horn v. State, 5 Wyo. 501, 40 P. 964 (1895). In upholding the conviction, the court repeatedly referred to the oil location as a "mining claim" and treated the land for purposes of the statute as "mineral land".

Other Wyoming state court decisions also support the rule that a reservation of "all coal and other minerals" includes oil and gas. In State ex rel. School District No. 1 v. Snyder, 29 Wyo. 163, 212 P. 758 (1923), the court approved the following language from Swayne v. Lone Acre Oil Co., 98 Tex. 597, 86 S.W. 740:

> Oil before its extraction is a mineral and is a part of the land, and in so far as the question under discussion is concerned it is to be considered like iron, coal, lead, or other mineral substances." 212 P. at 765.

In a well reasoned article dealing with this question, Prof. Kuntz supports a rule of law for Wyoming in accord with the majority approach. He reasons that both the probable intent of the parties and the development of Wyoming's petroleum resources are best served by a rule of law interpreting a grant or reservation that includes "minerals" as affecting a severance of the entire mineral estate, including oil and gas.

The article perceptively points out that the rules developed in Pennsylvania and Arkansas have gone astray by trying to find a specific intent to include a particular substance as a mineral. On the contrary, it was obvious to Prof. Kuntz that these instruments were reflecting a general intent. This general intent was:

". . . to sever from the surface all substances presently valuable in themselves, apart from the soil, whether their presence is known or not, and all substances which became valuable through development of the arts and sciences." (P. 113). See also, Northern Natural Gas v. Grounds, 441 F.2d 704, 714 (10th Cir. 1971), cert. denied, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267(1971).

The policy considerations in favor of this interpretation are considerable. An established rule of law provides a reliable means of ascertaining mineral ownership. This certainty is important because of the heavy investment of capital required to develop petroleum and other mineral resources. Without an established rule of law, the courts would necessarily be called upon to interpret numerous reservations. This is evident from the series of cases that result in states following Arkansas authority. With every new technology that develops a use for a particular gas or hard rock mineral, resort is made to the courts.

> Conservation of judicial resources is another valuable advantage of the Kuntz rule.

461 F. Supp. at 281, 282-283 [footnotes omitted].

Guild Trust, however, contends that even if the phrase "coal and other minerals", standing alone, includes oil and gas as a matter of Wyoming law, the reservation in the deed contains several references to "mines" or "mining", terms which are inappropriate to the extraction of oil and gas, and which create such ambiguity as to require the receipt of extrinsic evidence of intent. Amoco argues, on the other hand, that no ambiguity is created. The parties have relied on decisions from other states in support of their positions on this question of Wyoming law.

In our view, the existing Wyoming

authority supports Amoco. The Wyoming statutory and constitutional provisions cited by the District Court include petroleum among those resources taken from "mines". We believe it significant that after the District Court rendered its decision in the case at bar, the Wyoming Supreme Court decided Coronado Oil Co. v. Grieves, 603 F.2d 406 (Wyo. 1979). The issue in that case was whether the term "mining", as employed in a Wyoming eminent domain statute, 1-26-401, W.S. 1977, includes oil and gas exploration. The Court held that "mining" includes oil and gas exploration, a construction which the Court felt was "hardly unique or expansive of that term" 603 P.2d at 411. Guild Trust argues that Coronado Oil is not on point, inasmuch as the issue there was one of statutory construction, rather than of

interpretation of language in a deed. The importance of Coronado Oil, however, is that the Wyoming Supreme Court stated that its reading of the statutory term "mining" was the ordinary and natural one. While not a controlling expression of state law on the issue presented here, Coronado Oil is "persuasive and entitled to consideration by this Court." City of Aurora, Colorado v. Bechtel Corporation, 599 F.2d 382, 386 (10th Cir. 1979). If the Wyoming Supreme Court were presented with the precise issue presented in this case, we believe it would hold that the deed term "other minerals" includes oil and gas as a matter of law, notwithstanding the references to "mines" or "mining" contained in the reservation.

Guild Trust also contends that in several respects it did not receive a

fair trial. It complains that the District Court denied certain discovery requests, set unreasonable deadlines, rushed Guild Trust to trial, and permitted Amoco to change the issues just before trial. We hold that Guild Trust was not deprived of a fair trial.

Early in the proceedings, Guild Trust knew that the controlling legal issue was whether the Railroad reserved the oil and gas under the 1909 deed. In a memorandum filed November 30, 1977--slightly in excess of one month after the complaint was filed, and almost six months before trial--Guild Trust argued that "liquid hydro-carbons were not included within the word 'minerals'" in the deed, and that "the words of the reservation can only be interpreted in light of what the parties contemplated at the

time of the purported reservation taking into account all of the facts and circumstances then existing." In a memorandum filed December 1, 1977, Amoco argued to the contrary, that "a general grant or reservation of 'minerals', whether or not accompanied by a reference to specific minerals such as coal, unambiguously includes oil and gas."

On April 5, 1978, six weeks before trial, the District Court granted Amoco's motion to amend the complaint to plead a quiet title count. Amoco's title to the oil and gas was then squarely put at issue, if it had not been at issue before. There was no abuse of discretion in permitting the amendment.

The pretrial order recites that, "Defendants maintain that the reservation of coal and other minerals did not

reserve the oil and gas and that defendants, as the owners of the surface, are the owners of these deposits as well." Guild Trust filed a lengthy trial memorandum in which it argued in excess of 200 pages that the Wyoming courts would view the reservation language as ambiguous and would resort to extrinsic evidence of intent.

From beginning to end, Guild Trust has defended the suit on the same legal argument urged on appeal. Accordingly, Guild Trust had adequate time to develop its argument to exhaustion, and it did so. Guild Trust's contention that it did not have a sufficient opportunity to gather extrinsic evidence of the intent behind the language of the deed is not relevant, inasmuch as the District Court ultimately ruled that the deed language was unambigu-

ous and that extrinsic evidence of intent would not be allowed. We, of course, agree with the District Court's reasoning.

WE AFFIRM.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-215K

November 29, 1978

Ewing T. Kerr, District Judge

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs,

vs.

GUILD TRUST, ET AL.,

Defendants.

MEMORANDUM OPINION

Plaintiffs are seeking injunctive relief and a determination of the mineral

title of a certain section of land located in Uinta County, Wyoming. The land in question is part of the "checkerboard" land grants of the U.S. government to the Union Pacific Railroad in the mid 1800's. The essential question to be resolved is the ownership of the oil, gas and associated liquid and gaseous hydrocarbons in and under Section 7, Township 14N, Range 117 West of the 6th P.M.

From the year 1850 to 1880, Congress granted to states, territories, and railroad companies upward to one hundred and fifty million acres of public domain in aid of the construction of railroads. With the passage of the Pacific Railway Acts of 1862 and 1864 (12 Stat. 489, 13 Stat. 356), these land grants were made directly to the railroad companies.

The act of July 1, 1862 granted to

the "Pacific railroad companies" rights of way over the public lands. The extent of these rights of way were 200 feet in width on each side of the center line of the railroad and all necessary grounds for buildings. In addition, the act granted every alternate section of public land not sold or reserved, designated by odd numbers, to the extent of ten miles on each side of the road. The amendatory act of July 2, 1864 enlarged this grant to the extent of twenty miles on each side of the road.[1]

The lands were given to the railroad companies to raise funds to construct the railroad and to give them the necessary right of way. The railroad companies used the land as collateral for loans or

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[1] 1 Lindley, Curtis H., A Treatise On the American Law Relating to Mines and Mineral Lands § 151 (1914).

would sell the land directly.

In this particular case, the United States issued a patent to UPRR dated October 31, 1901. The railroad then conveyed the surface of Section 7 to the devisees under the last will and testament of C. L. Byrne in July of 1909. The deed reserved to the Union Pacific "[a]ll coal and other minerals within or underlying said lands" and associated rights of entry and surface use.[2]

This reserved mineral estate was conveyed by Union Pacific Railroad Company to plaintiff, Union Pacific Land Resources Corporation. The latter corporation then

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[2]The reservation in the Deed reads:

"Excepting and reserving to said Union Pacific Railroad Company, its successors and assigns,

First: A strip of land two (200) hundred feet wide on each side of the center line of the railroad of said Union Pacific Railroad Company as said road is now constructed over and across said land.

executed a mineral deed of the oil and gas rights to Champlin Petroleum Company. Champlin then granted an oil and gas lease to Amoco. Defendants Guild Trust are the successors in interest under the Byrne will and therefore the owners of the surface estate.

Prior to the commencement of drilling on Section 7, Amoco sought the consent of

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Second: All coal and other minerals within or underlying said lands.

Third: The exclusive right to prospect in and upon said land for coal and other minerals therein, and to mine for and remove, from said land, all coal and other minerals which may be found thereon by any one.

Fourth: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from such prospect places or mines, and for the convenient and proper operation of such prospect places, mines and for roads and approaches thereto or for removal therefrom of coal, mineral, machinery or other material."

Guild Trust to the proposed drilling, Amoco offered the usual royalty interest in any minerals recovered. The Guild Trust refused the offer and would not allow Amoco access to the land. Guild Trust contended that the deed was ineffective to reserve the oil and gas rights.

Both the plaintiffs and the defendants seek to quiet title in themselves. The plaintiffs also seek injunctive relief to ban the defendants from interfering with mineral exploration.

This case revolves around an interpretation of a deed, in particular the meaning of the reservation clause "all coal and other minerals." The intent of the parties to the deed must be determined.

Kirgis in his article, "Mineral Reservations by Railroads and Local Government Bodies", Second Annual Rocky Mountain

Mineral Law Institute, p. 1, 3, (1956), states that:

"The basic legal principle in this subject area is that the intention of the parties controls in the interpretation of an instrument and, if the intention of the parties can be ascertained from the instrument itself, arbitrary rules of law as to construction will not be involved. The intention of the parties will be derived from the 'four corners' of the instrument and parol evidence is admissible to prove intention only where the instrument is ambiguous on its face and where, in any given jurisdiction, the interpretation of the language of the instrument is not subject to a fixed 'rule of law'."

Although the Supreme Court of Wyoming has not ruled on this type of reservation, many state and federal courts have. The

great weight of authority establishes that this language unambiguously includes oil and gas and is effective to sever the entire mineral estate.

Professor Hemingway in "The Law of Oil and Gas" §1.1 (1971) states the proposition:

"In perhaps a majority of states, a conveyance or reservation of the 'minerals' will include oil, gas and petroleum products, unless a contrary intent is manifested on the face of the instrument." See also, 1A Summers, The Law of Oil and Gas §135 (1954):

"It is a general rule adhered to by a majority of the courts, that a conveyance or exception of minerals includes oil and gas, unless from the language of the instrument, or from the facts and circumstances surrounding the parties at the

time of the execution, it is found that the term was used in a more restricted sense."

Besides this favored approach to mineral reservations, courts have used two other approaches.[3]

The first approach is commonly referred to as the "Pennsylvania rule" since it stems from the case, Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am.Rep. 696 (1882). This rule states that the term "mineral" does not include oil and gas unless other language in the instrument indicates an intent to include these specific resources. Thus, it employs a unique presumption that minerals not expressly named in a reservation are not

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[3] 1 H. Williams and C Meyers, Oil and Gas Law §219 (1977)
R. Hemingway, Oil and Gas Law §1.1 (1971)

reserved. Through long usage it has become a rule of property in Pennsylvania.

The second approach stems from an Arkansas case, Missouri Pacific Railroad v. Strohacker, 202 Ark. 645, 152 S.W. 2d 557 (1941). This rule states that a grant or reservation of minerals is ambiguous as to whether oil and gas are included, therefore extrinsic evidence of the use of the term at the particular time and place of the conveyance is required. Courts of that state have tested the content of a reservation including "minerals" by the general legal and commercial usage of the term.

Although the Arkansas approach was not used by the court in reaching its determination, extrinsic evidence was presented. Petroleum historians and geologists presented fascinating informa-

tion on early petroleum discoveries in Wyoming. It was clearly established that petroleum, oil and gas were thought of as minerals in Wyoming as early as the 1870's. Evidence was presented from popular, general circulation journals and newspapers as well as scientific and governmental publications. There is no doubt that even under the limited Arkansas approach that the term "mineral" includes oil and gas.

Although a few jurisdictions outside these states have cited the above rules, they are considered by most scholars to be limited in application to the states of their birth.[4] For the most part, these two approaches have not been

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[4] Kirgis, supra at 9

followed in the West. See, Western Development Co. v. Nell, 4 Utah 2d, 112; 288 P.2d 452 (1955) and New Mexico and Arizona Land Co. v. Elkins, 137 F. Supp. 767 (D.C.N.M. 1956).

One important reason for this is the pervasive influence in the West of the federal public land laws. Pruitt makes clear in his article, "Mineral Terms -- Some Problems In Their Use and Definition", Eleventh Annual Rocky Mountain Mineral Law Institute 1, 12 (1966), that the federal laws referring to "minerals" have:

"[f]rom an early date . . .been very broadly interpreted to include virtually every known substance found in the earth which has sufficient value to warrant the cost of its extraction. It is not surprising, therefore, that the Western

states . . . have adopted broad, all-inclusive interpretations of the term "minerals" in contrast to the sometimes narrow interpretations adopted in the midwestern and eastern states."

While the courts in Wyoming have not been called upon to determine whether a reservation or grant of "minerals" includes oil and gas, Wyoming law has always considered oil and gas to be minerals and to be part of the mineral estate. Territorial statutes enacted in 1888 grouped petroleum with other minerals.[5] The State's Constitution also classified oil with other minerals,

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[5] Sess. Laws 1888, ch. 40, § 1 authorized the formation of mining districts "[i]n any mining district or in [any] mining field of discovery of veins, leads, lodes or ledges, or of gold placers, petroleum fields, soluble salt deposits, or of any mineral lands whatever, . . ."

Section 3 of Article 15 provided for the taxation of mines and mining claims, including those for oil.[6]

An 1895 Wyoming Supreme Court decision reviewed a criminal conviction under Section 10 of the 1888 territorial statute, the culprit having destroyed a building on an oil placer mining claim site. Van Horn v. State, 5 Wyo. 501, 40 P. 964 (1895). In upholding the conviction, the court repeatedly referred to the oil location as a "mining claim" and treated the land for purposes of the statute as "mineral land".

Other Wyoming state court decisions

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[6] Then, as now, that section read as follows: "All mines and mining claims from which gold, silver, and other precious metals, soda, saline, coal, mineral oil or other valuable deposit, is or may be produced shall be taxed . . ."

also support the rule that a reservation of "all coal and other minerals" includes oil and gas. In State ex rel. School District No. 1 v. Snyder, 212 P. 758 (Wyo. 1923), the court approved the following language from Swayne v. Lone Acre Oil Co., 98 Tex. 597, 86 S.W. 740:

> "Oil before its extraction is a mineral and is a part of the land, and in so far as the question under discussion is concerned it is to be considered like iron, coal, lead, or other mineral substances." 212 P. at 765.

In a well reasoned article dealing with this question, Prof. Kuntz supports a rule of law for Wyoming in accord with the majority approach.[7] He reasons that both the probable intent of the parties and the development of Wyoming's petroleum resources are best served by a rule of law interpreting a grant or reservation

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[7] Kuntz, The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107 (1949)

that includes "minerals" as effecting a severance of the entire mineral estate, including oil and gas.

The article perceptively points out that the rules developed in Pennsylvania and Arkansas have gone astray by trying to find a specific intent to include a particular substance as a mineral. On the contrary, it was obvious to Prof. Kuntz that these instruments were reflecting a general intent. This general intent was:

". . .to sever from the surface all substances presently valuable in themselves, apart from the soil, whether their presence is known or not, and all substances which become valuable through development of the arts and sciences." (p. 113). See also, Northern Natural Gas v. Grounds, 441 F.2d 704, 714 (10th Cir.

1971), cert. denied, 404 U.S. 951 (1971).

The policy considerations in favor of this interpretation are considerable. An established rule of law provides a reliable means of ascertaining mineral ownership. This certainty is important because of the heavy investment of capital required to develop petroleum and other mineral resources. Without an established rule of law, the courts would necessarily be called upon to interpret numerous reservations. This is evident from the series of cases that result in states following Arkansas authority. With every new technology that developes a use for a particular gas or hard rock mineral, resort is made to the courts. Conservation of judicial resources is another valuable advantage of the Kuntz rule.

The authorities cited above and the references to case law contained in those works are persuasive. Two federal cases can be singled out as controlling this decision.

The first is an U. S. Supreme Court decision written by Justice Van DeVanter, formerly of the Wyoming Supreme Court, Burke v. Southern Pacific Railroad Co., 234 U.S. 669 (1913). This decision squarely holds that petroleum is a mineral. This case was certified up to the Supreme Court to answer seven questions that arose out of land grants to Southern Pacific Railroad with reservations to the United States government.

The important question for the purposes of this present case is the fifth: "Is petroleum a mineral oil within the meaning of the term 'mineral' as it was

used in said acts of Congress reserving mineral land from the railroad land grants?", p. 676. After discussing case law and scientific opinions on the nature of petroleum, the court concluded:

"The statute. . .was dealing with a practical subject in a practical way and we think it used the words 'mineral land' and intended they should be applied in their ordinary and popular sense. In that sense. . .they embrace lands chiefly valuable for petroleum. Our answer to the fifth question must therefore be in the affirmative." p. 679.

The second case is a Tenth Circuit decision, Sheen v. Lynch, 48 F.2d 1044 (10 Cir. 1931). This controversy involved a patent issued under the Stock Raising Homestead Act of 1916 which reserved "all coal and other minerals"

to the United States. This language is identical to the language used in the Deed in this present case.

The Tenth Circuit held that this reservation was effective to reserve petroleum to the United States as part of a severed mineral estate. The Court said there was:

"No room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stock raising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States." p. 1046.

It is clear from all of the above authorities that the reservation of "all coal and other minerals" is unambiguous

and severs the mineral estate from the surface, including the oil, gas and associated liquid and gaseous hydrocarbons and reserves the mineral estate to the grantor.

Plaintiffs are therefore entitled to judgment giving them title to the entire mineral estate, including oil, gas and associated liquid and gaseous hydrocarbons, in and underlying Section 7 (except the NE 1/4 and 25.17 acres of abandoned railroad right-of-way). Further, plaintiffs are entitled to a permanent injunction against any interference by the defendants in the reasonable enjoyment of their rights in the mineral estate.

Judgment will be entered in accordance with this Memorandum Opinion.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-215K

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs,

vs.

GUILD TRUST, ET AL.,

Defendants.

(Filed November 28, 1978)

JUDGMENT

The above-entitled matter coming on regularly for hearing before the Court, Houston G. Williams, D. Thomas Kidd and Harry O. Hickman appearing as attorneys for plaintiffs and Charles D. Phillips and John D. Troughton appearing as attorneys for defendants; the Court having heard the testimony adduced in said matter and having taken said cause under advisement and having carefully

considered the evidence, the exhibits and all matters relevant hereto and having prepared and filed herein its memorandum opinion finding generally for the plaintiffs and against the defendants,

NOW, THEREFORE, IT IS

ORDERED that the relief sought in plaintiffs' Amended Complaint should be, and the same is hereby granted, and the defendants' Counterclaim is hereby denied in all respects; it is

FURTHER ORDERED that plaintiffs are collectively the owners in fee simple of all right, title and interest in and to all coal and other minerals, including all oil, gas and associated liquid and gaseous hydrocarbons, together with attendant rights of surface access ("the subject estate") in and underlying certain real property situated in the County

of Uinta, State of Wyoming, particularly described as Lots 1, 2, 3 and 4, E1/2W1/2 and SE/4 of Section 7, Township 14 North, Range 117 West of the 6th Prime Meridian (except the abandoned Union Pacific Railroad Company right-of-way), and the right, title and interest of plaintiffs thereto is forever quieted against the defendants, and each of them, and against all persons claiming by, under or through the defendants and each of them; it is

FURTHER ORDERED that the claims of the defendants and all who claim by, under or through them in and to the subject estate are without right or merit, and said defendants have no right, title or interest whatsoever in or to the subject estate or any part thereof; it is

FURTHER ORDERED that the defendants, all persons claiming by, under or through

the defendants, their officers, agents, servants, employees and attorneys, and any persons in active concert or participation with them who receive actual notice of this order are hereby permanently enjoined from asserting any right, title or interest whatsoever in or to the subject estate or any part thereof and are enjoined from interfering with the exercise by plaintiffs of their rights in and to the subject estate; it is

FURTHER ORDERED that each of the parties pay their own costs.

Dated this 29th day of November, 1978.

/s/ Ewing T. Kerr
U. S. District Judge

App. 44

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-215K

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs,

vs.

GUILD TRUST, ET AL.,

Defendants.

(Dated December 11, 1978)

MOTION FOR NEW TRIAL

Defendants move the Court to set aside its findings of fact and conclusions of law and judgment entered herein on November 29, 1978, and to grant defendants a new trial on the following grounds:

1. The Court erred in ruling that the reservation by the Union Pacific Railroad Company in its contract with C. L. Byrne dated May 25, 1899, and in

its deed issued pursuant thereto dated July 27, 1909, essentially of

> "all coal and other minerals" together with "the exclusive right to prospect. . .and to mine for and remove. . .all coal and other minerals" with the right of access "to prospect for, mine and remove any and all such coal and other minerals" and "the right of way to and from such prospect places or mines. . ."

unambiguously reserved to the railroad as a matter of law the entire mineral estate, including the oil, gas and associated liquid and gaseous hydrocarbons. The Court's ruling ascribes to the State of Wyoming an extreme rule of property, not announced or adopted by the Wyoming Supreme Court and not now in force in any other state, that a reservation of "minerals", when coupled with a specified solid mineral, coal, and when included therewith in the reservation are mining rights or easements applicable or

appropriate only to the recovery of solid minerals, unambiguously includes as a matter of law the oil and gas. Such a ruling is wholly at odds with the case law of the states following the majority rule, which uniformly and routinely hold such a reservation to be ambiguous as including oil and gas and places the burden on the grantor or his successors to establish by extrinsic evidence that the parties, especially the grantor (as maker), intended the reservation to include the oil and gas. The ruling of the Court is based on cases interpreting legislative enactments or grants from the sovereign pursuant thereto, in light of legislative purposes and where opposite rules of construction apply, and which cases have no relevancy and are of no authority in construing the term

"minerals" as used in a transaction between private parties where their intention controls.

2. The Court erred in refusing to dismiss the plaintiff's complaint and to dissolve the temporary restraining order after the hearing held November 30, 1977, for the reasons set forth in defendants' Motion to Dismiss and defendants' Motion to Dissolve Temporary Restraining Order, etc., filed November 14, 1977, and in the Memoranda in support thereof.

3. The Court erred in continuing the temporary restraining order in effect and thus permitting the drilling of a dry hole on defendants' lands to their irreparable harm before the underlying issue of the ownership of the oil and gas estate was adjudicated. By so doing, the Court in effect took defendants' property

without due process of law, gave the leasing rights and exploration rights in defendants' lands to plaintiffs, and permitted the destruction of the leasing value by the drilling of the dry hole. And in so doing, the Court placed itself in a position whereby it could not ultimately rule for defendants on the underlying issue of the ownership of the oil and gas without acknowledging that it had wrongfully and irreparably harmed defendants by continuing the temporary restraining order in effect but would avoid this problem if it ruled in favor of plaintiffs. The impartiality of the Court, or at least the appearance of impartiality in deciding the case was therefore compromised.

4. The Court erred in refusing to abstain from exercising its jurisdiction

and remitting the parties to their remedies in the courts of the State of Wyoming, as the Court should have done for the reasons set forth in the Fifth Defense contained in defendants' original Answer and Counterclaim and because of the difficult position of the Court in deciding the case impartially.

5. The Court erred in ordering all discovery to be completed within 30 days after the hearing held November 30, 1977, the same being impossible under the Federal Rules of Civil Procedure and not being required by the District Court's own rules subsequently adopted, in ignoring defendants' request made by letter dated December 14, 1977, for an early hearing on the first five defenses contained in its original Answer and Counterclaim before discovery or pre-

trial, and in, instead, setting the case for trial on March 9, 1978, without consultation or provision for pre-trial, immediately after the time set for completion of discovery had expired.

6. The Court erred in dismissing from the action the Union Pacific Railroad Company and Upland Industries Corporation, joined by defendants as Additional Defendants in the action in defendants' original Answer and Counterclaim, and in dismissing from the action the Union Pacific Corporation, Union Pacific Railroad Company and Upland Industries Corporation, joined by defendants as Additional Defendants in defendants' Answer and Counterclaim to plaintiffs' Amended Complaint, said Additional Defendants being the real railroad parties in interest and proper parties to the

action as interlocking railroad corporations who wholly owned plaintiffs Union Pacific Land Resources Corporation and Champlin Petroleum Company, and upon whom defendants wished obtain discovery and against whom defendants wished to quiet their title in the oil and gas estate in the lands in dispute including the abandoned right of way.

7. The Court erred in denying to defendants the discovery requested in their First and Second Requests for Production of Documents, for the reasons set forth in defendants' letters to the Court of May 2 and May 13, 1978 (copies to counsel and to the Clerk for filing), which requests were for documents relevant to the subject matter of the action or reasonably calculated to lead to the discovery of relevant evidence.

8. The Court erred in requiring the defendants to go to pre-trial on May 19 and to trial on May 22, 1978, in that defendants did not have a reasonable period of time to complete preparation for trial. Specifically:

(a) The Amended Complaint was filed only on April 5, 1978, and while purporting not to do so, it changed the issue from a request by plaintiffs for a permanent injunction to a quiet title action to the entire mineral estate, and the time before trial was inadequate to prepare for the enlarged issue, especially without discovery which was denied by the Court.

(b) The defendants, by letter to the Court dated May 2 and amplified and elaborated upon by letter

dated May 13, 1978, outlined the reasons the case should not go to trial on May 22, 1978, and defendants renew each objection stated therein. Copies of said letters are attached hereto.

(c) The dates agreed upon on April 5 for pre-trial and trial were tentative only, as they had to be as defendants had not yet at that time received plaintiffs' first production of documents and could not have then known whether further discovery would be required. Defendants, after laborious analysis of the stack of photocopies of self-serving documents produced by plaintiffs in their first production, prepared and on May 1, 1978, served their Second Request for Production of Documents

made necessary by plaintiffs' first production. By letter of the next day as aforesaid, defendants requested a postponement of pre-trial and trial. The Court responded neither to defendants' Second Request for Documents nor to their request for postponement of pre-trial and trial until May 15, when by letter of that date (received by defendants on May 16, two days before the hearing set on defendants' said requests, three days before the time set for pre-trial, and six days before the time set for trial) the Court advised that counsel would be prepared for pre-trial and for trial at the times scheduled, and that the Court viewed the matter primarily as one of law and not of fact. By this

time defendants, not knowing whether they would be granted their discovery or what their evidence might be, and having had no time to prepare for trial, were hopelessly compromised in being able to adequately prepare for trial. The sequence of events, leading to a trial for which defendants were completely unprepared, is summarized on pages 2 through 18 of Defendants' Trial Memorandum, copies of which pages are attached hereto as a part hereof.

(d) Defendants' counsel did not learn until the morning of the trial that all of the exhibits in the Radke case had not been returned to the Union Pacific Railroad Company, but that some had been returned to Mr. Robert Martin, the landowners'

attorney in that case, and defendants had no opportunity to secure copies thereof.

9. The law problem involved is a difficult problem. The principle decided will be of far-reaching importance to defendants, in that while only one parcel of land is involved in this suit, the defendants as well as possibly thousands of Wyoming landowners, own other lands involving the same legal principle. Because of the temporary restraining order, the land involved in this suit has had a dry hole drilled on it and its leasing value destroyed and the geologic information obtained by plaintiffs. Thus, as to this particular land, the oil and gas values appear to now be slight, but the extension of the Court's holding in this case to other lands of defendants and to

the lands of other Wyoming landowners makes the holding herein of critical importance. The Court has ruled without the benefit of defendants' brief, which admittedly was filed late. However, the brief has been filed, and sets forth the law which should be controlling in this case. The judgment should therefore be vacated, and the Court should consider the defendants' brief and correct its erroneous holding that the contract and deed, as a matter of law, unambiguously reserved the entire mineral estate, including the oil and gas, and should permit full discovery and a full evidentiary hearing on all material and relevant evidence relating to the intent of the parties in 1899, when the contract was executed, and in 1909, when the deed was executed and delivered.

Respectfully submitted:

/s/ Charles D. Phillips
Charles D. Phillips
Attorney for Defendants
P. O. Box 514
Evanston, Wyoming 82930

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 1978, I mailed copies of the foregoing Motion for New Trial to Houston G. Williams, D. Thomas Kidd, Frank H. Houck and Harry O. Hickman, attorneys for plaintiffs, at their respective addresses of record.

/s/ Charles D. Phillips
Charles D. Phillips

ATTACHMENTS TO PLAINTIFFS' MOTION FOR NEW TRIAL

May 2,1978

Honorable Ewing T. Kerr
Judge, U. S. District Court
P. O. Box 888
Cheyenne, Wyoming 82001

Amoco Production Company, et al. vs. Guild Trust, et al., No. C77-215K

Dear Judge Kerr:

Regretfully, I must request a postponement of the trial date set in the above matter for May 22, 1978. I am aware that we agreed to this date although we much preferred a trial setting in June. I believe, however, that the trial date set was conditioned on the assumption that the photocopies of the documents then being produced for us by plaintiffs would not raise further discovery problems or issues that would inevitably delay our preparation for trial. This, however, is exactly what has happened.

At the time of our April 5 hearing, the parties were in the middle of listing the photocopies of the documents being produced by plaintiffs, and at this time we did not even know what all of the documents would be that we were receiv-

ing. Obviously, we could not at that time have read and analyzed the documents so as to be sure that there would be no future problems. The documents, when stacked, make a pile almost eight inches high, and have taken a great deal of time to study and digest.

I understood at the hearing held March 7 that the Court granted all of our requests for production of documents, except possibly paragraphs 8, 9 and 10, but only as they pertained to Section 7-14-117. The written order on the matter, however, limited our discovery to the first seven paragraphs. Plaintiffs, nevertheless, produced a mass of photocopies of documents pertaining to discovery requests outside the first seven paragraphs, as can be seen from their "Plaintiffs' Memorandum of Documents Produced", mailed to the Clerk of Court

for filing on April 13, and these documents, as well as those produced in response to our paragraphs 1 through 7, have raised further questions and created the need for substantially more discovery. I am enclosing herewith a copy of Defendants' Second Request for Production of Documents and Records, mailed yesterday to the Clerk and the attorneys, listing additional documents we presently need on the basis of those already produced.

Without belaboring the issue or the Court on the matter at this time, a few examples might be in order:

First: Plaintiffs, apparently in response to paragraph 13 of defendants' requests, produced as its Document 23 tax records and some correspondence therewith showing that the Union Pacific paid taxes on "mineral reservations" on Section 7 for the years 1918 through

1956, and other tax records showing the purchaser paid all the taxes for the years 1900 through 1903. Who paid the taxes for the year 1904 is not clear from the records produced. Plaintiffs did not furnish the tax records for the years 1905 through 1916, which are the important records, for it must have been during these years that the Union Pacific first began paying taxes on its belatedly claimed reserved minerals. We have requested production of the tax records for these years.

Second: Plaintiffs, apparently in response to paragraph 7 of our requests, produced as Documents 9, 10, and 17-22, catalogues and lists (only the page listing Section 7) of mineral reservations for various years from 1946 to 1977. We are already aware that at all these times the Union Pacific and its succes-

sors were claiming the oil and gas with its "mineral reservations". What we want to know, and what is important, is what the Union Pacific was claiming each year before 1921, and we have asked for these records. In this matter, as well as with the taxes and other matters, plaintiffs appear to be spoon-feeding us with information favorable to themselves. We feel we are entitled to all of the records in these matters, not just the documents plaintiffs choose to produce, and we have asked for them.

Third: Plaintiffs produced a photocopy of page 193 of the Union Pacific's Record of Deeds Issued book. Under the "reservations" column for Section 7, in dark ink, is written the word "coal". Following the word coal, in lighter ink, are written the words "and other minerals". Deeds to other lands recorded on this

page are shown also to contain "coal" reservations, and yet other deeds to other lands recorded on this page are shown to contain reservations of "oil and coal". At the trial of the Radke case, the deposition of one Harry A. Swanson, who at that time had worked more than 30 years in the Union Pacific's land department, was read into evidence. Swanson apparently testified that the railroad in 1919 went back and added the words "and other minerals" after the word "coal" in the Reservations column of the deed record book. We understand from plaintiffs' attorneys that Mr. Swanson is now deceased, and we know of no other evidence as to how the words "and other minerals" was added. Unfortunately, Union Pacific attorneys withdrew all of the exhibits from the district Court file in the Radke case on November 1, 1977

(three days after Amoco filed this case), and consequently, we have had to request production of these documents.

Defendants have maintained from the beginning that the Union Pacific Railroad Company did not, by its use of the words "coal and other minerals" in its contract and deed to Section 7, reserve or intend to reserve the oil and gas estate. We have further maintained that the railroad's own records would help to establish that fact. From the above, and these are only a few examples, it is obvious that the railroad's records are highly relevant and that a great deal of discovery remains to be done.

We are already well outside the four corners of the deed to Section 7, and I assume that, for discovery purposes at least, we will be entitled to pursue our discovery into all areas which might

have a bearing on the intent and understanding of the parties at the time the contract of sale was entered into and when the deed was executed and delivered. There are obvious problems with the limits, if any, of discovery in this case, for who is to say what records might, and what records might not, shed light on the intention of the parties, until the records have been produced and examined. Does the fact that the deed in question reserves "coal and other minerals", while other deeds issued at the same time reserve "oil, coal and other minerals", shed any light or have any bearing on the intention or absence of intention of the grantor to reserve the oil and gas? We firmly believe that it does, and if so, then these as well as the railroad's other conveyances and records should be subject to our dis-

covery. The railroad is obviously not the average person when it comes to dealing in land sales. It began over one hundred years ago to sell lands from a twelve-million acre land grant, and over the years its contracts and deeds have taken many different forms in an ever-changing legal and factual climate. In this type situation, it seems to us that it is next to impossible to put any one tract of land in a vacuum, independent of and insulated from all of the circumstances surrounding the transaction, including other sales before, after, and at the same time.

We would hope, by interrogatories to be filed shortly, to discover the location of numerous documents which we wish to examine, and I would expect that we would then examine at least some of these documents at the place they are located. Undoubtedly, it will take a

substantial length of time for us to make complete discovery and prepare our case for trial. Again, we have no reason to delay this matter beyond what is necessary, and we do not wish to do so, but we do need very badly to make our discovery. Since the well has already been drilled and Amoco's lease is now secure, we know of no urgency which should restrict our discovery for reasons of time.

In reading the new Rules of the District Court, which we did not have at the time of the last hearing, this appears to be one of those complex cases contemplated by Rule 8(b), in which preliminary pre-trial conferences would be very helpful. Again, through no fault of our own, there is simply no possible way that we can be prepared for trial at any time close to May 22, if

we are to have any chance of adequately preparing and presenting our case. We are at present scheduled for appearances before the Court on May 18 in the removed case of Guild Trust, et al vs. Union Pacific Corporation, et al, Civil No. C78-040, on their motions for dismissal of certain parties from that action, and again on May 19 for a pre-trial conference in the instant case. If you will postpone our May 22 trial date, it would certainly be helpful to us if we could appear in both matters on the same date. The May 18 date would be more convenient for me, but either date would be fine. If these cases are to remain in the Federal Court, after one more try at abstention, I would at that time like to discuss the possibility of the two cases being consolidated so as to simplify discovery proceedings as much as possible.

I had not intended this letter to be so long, and I am making it longer by saying so. I hope it explains why we feel a postponement is an absolute necessity and that we are not trying to unnecessarily delay the proceedings. We have no reason, good or otherwise, to do so.

Respectfully,

/s/ Charles D. Phillips

Charles D. Phillips

Enclosure

cc: Mr. Williams
Mr. Kidd
Mr. Houck
Mr. Troughton
Clerk of Court

May 13, 1978

Honorable Ewing T. Kerr
Judge, U. S. District Court
P. O. Box 888
Cheyenne, Wyoming 82001

Re: Amoco Production Co., et al.
v. Guild Trust, et al.
Civil No. C77-215K

Dear Judge Kerr:

I must respond to Mr. Kidd's letter to you of May 8, 1978, wherein Mr. Kidd accuses defendants of employing tactics and strategems to delay a resolution of this case for no good reason by the device of filing spurious and late discovery requests. Actually, what now begins to surface is just one more in a long list of railroad tactics and strategems designed to choke off defendants' discovery and control the evidence while at the same time forcing through a quick and premature resolution of the case before the truth can come out. On

both of these matters we will elaborate.

Defendants' tactics and strategems.

Defendants are accused by Mr. Kidd of employing a strategem, previously used, of unduly delaying the trial of this case by the filing of late discovery requests. He can suggest no good reason why defendants would want to do so, and of course this is not the case at all. He accuses defendants of having previously employed this strategem to get a two and a half-month delay by a late filing of defendants' First Request for documents. In response to that accusation it should be noted that at the end of the hearing held in Casper on November 30, 1977, the Court denied defendants' motions to dismiss and to dissolve, continued the restraining order in effect, gave defendants until December 10 to file their Answer, and ordered all discovery

completed within thirty days. Up to that time defendants were fully occupied in a mad scramble simply to stay alive and prevent, if possible, a final adjucation against them in the form of a permanent injunction before they could even plead, let alone prepare, their case. Up to then, it was not even known if defendants would be permitted to make discovery. On December 12 (December 10 being a Saturday), defendants filed their Answer and Counterclaim. On the same date, by my letter to the Court, defendants requested an early hearing on the first five defenses contained in their Answer, and enclosed a copy of the case of Missouri Pacific Railway Co. v. Strohacker, 152 S.W. 2d 577, which could only demonstrate that defendants' claims were substantial. That case squarely holds that a reservation of coal and other mineral

deposits, together with attendant "mining rights", in a deed conveying land grant lands in 1893, did not reserve the oil and gas. It is the only case we know of out of a State court of last resort which is on all fours with this case, and at the least should have laid to rest any question of the reservation of coal and other minerals being construed as a matter of law to include oil and gas, and showed that a resort to extrinsic evidence would be necessary. Defendants received no response from the Court to their request for an early hearing on their first five defenses, and matters continued until plaintiffs filed their Reply to defendants' Counterclaim on December 29, one day prior to the date when all discovery was to be completed. Obviously, defendants could not even have obtained discovery, let alone completed

discovery, in the thirty day period allowed. This is clear from the fact that when defendants finally did file their First Request for documents (after waiting for and receiving no response from the Court to their request for an early hearing), it was two months, less two days, before plaintiffs produced any documents whatever, and these documents were unsatisfactory in the extreme and in the form of photocopies. In addition, at the time of the November 30 hearing and at all times relevant thereafter, defendants were unable to obtain from the Clerk of Court a copy of the District Court Rules because they were being revised. After finally receiving a copy of the revised Rules, we discover that Rule 7(j) provides as follows:

> "(j) Whenever possible, discovery proceedings in all civil actions filed in this

> Court shall be completed within ninety (90) days after joinder of issue or after such issues may have been determined at the initial pre-trial conference; provided that, upon good cause shown, and upon timely application, exceptions hereto may be granted and the time for completion of such discovery proceedings therein extended by order of the court."

On November 30, when, the thirty day completion of discovery deadline was imposed, defendants had not even filed their Answer. According to Mr. Kidd, this all adds up to a tactic or strategem by defendants to unduly delay a resolution of the case. We disagree.

Defendants are next accused by Mr. Kidd of employing the same strategem to again unduly delay the trial by late filing of their Second Request for documents. Apparently, Mr. Kidd feels that, because a tentative trial date of May 22 was set, defendants should be stuck with (and bound by) whatever

plaintiffs might choose to produce in response to defendants' First Request. The trial date set was obviously tentative and subject to change, as, at the time the date was agreed upon, plaintiffs had not yet on that day produced all of their documents in response to defendants' First Request. Mr. Kidd complains that defendants took too long to make their Second Request, and that this was for some ulterior purpose. He apparently feels that taking 26 days (from April 5 to May 1) to read, study, digest and gain the import of a mass of photocopies eight inches high, and thereafter to prepare requests for the production of further documents based thereon, is dilatory and obstructionist. Apparently, however, six days (from May 2 to May 8) is not too long a time for Mr. Kidd to take to respond to my three and a half-

page letter. This of itself smacks of delay, calculated to create a sense of last minute urgency which would substantially prejudice plaintiff if a postponement were granted. Mr. Kidd does not state just how much time defendants should have taken in responding to the mass of photocopies produced by plaintiffs. I trust he would allow defendants at least some time, and I doubt very much that it would have made any substantial difference to plaintiffs in clearing their calendars, etc., if defendants' Second Request had been filed a week, or even two weeks, before May 1. What Mr. Kidd is really saying is that defendants, by agreeing to a tentative trial date of May 22, foreclosed themselves from any further discovery, irregardless of what plaintiffs might or might not choose to produce, because any postpone-

ment of that tentative trial date would substantially prejudice plaintiffs who had already cleared their calendars, etc. Again we disagree.

Plaintiffs' tactics and strategems. Defendants are not satisfied with Mr. Kidd's explanation on page three of his letter for plaintiffs failing to produce the tax records and correspondence for the years 1905 through 1916, and for failing to produce lists and catalogues of mineral reservations for the years prior to the year 1921. On April 5, by the time the attorneys for the parties had gotten around to listing the tax records being produced (which, incidentally, was after the hearing and the setting of the tentative trial date of May 22) it had already been a long day, and defendants' counsel took it on faith that the bundle produced contained the

tax records and correspondence with taxing authorities for the years 1899 through 1956. Defendants' counsel understood the tax records for all those years were in the bundle, and I will state flatly that it was at that time so represented to me by Mr. Kidd. It is so stated by Mr. Williams in Item 23 of his Plaintiffs' Memorandum of Documents Produced. Yet Mr. Kidd now states that the missing tax records and correspondence were not produced because plaintiffs do not have them. Of course plaintiffs do not have these records. The Union Pacific Railroad Company (UPRR) or some other non party railroad corporation has them. Thus we see the purpose of the railroad (being the whole corporate structure of the Union Pacific), in resisting defendants' efforts to join the nonparty railroad corporations, above all the UPRR,

as parties in this action. For as long as the UPRR, probably the custodian of the really crucial and highly relevant records and other documents in this case, is not a party to this action, plaintiffs and their attorneys can insulate from defendants' discovery any document they wish to hide, simply by (truthfully) advising the Court that their clients, the plaintiffs, do not have the document. The same would also apply to any records or other documents now in, or subsequently transferred to, the Union Pacific Corporation, Upland Industries Corporation, or any other of the interlocking nonparty subsidiary corporations spawned by UPRR. Plaintiffs' attorneys could not, of course, speak for these nonparty railroad corporations since they would not be represented in the action by counsel. And so

the railroad, through plaintiffs who serve as its "cat's paw", has a device, by means of a corporate shell game, to choke off defendants' discovery and in effect determine the evidence. This is especially true since the railroad at present commands the significant evidence, its own records. And so we see another tactic or strategem of the railroad, that of choking off defendants' discovery and at the same time forcing the case to an early and premature conclusion before the truth, as disclosed by the railroad's own records, can be brought out. If such is the case, as it surely is, there exists a clear and present danger of an injustice about to be done which the Court has the power and the duty to correct.

Unless all of the interlocking railroad corporations are made parties to

this action, and proper parties they all are, the railroad has a vehicle, through plaintiffs, to assume the Court's function of determining the evidence. The railroad corporations, parties and non-parties, are all part and parcel of the old UPRR before its various reorganizations, and the same group that controlled the old UPRR before reorganization now controls, through the Union Pacific Corporation, all of the railroad corporations created by the reorganizations. In view of the railroad's tactics, as they are now unfolding, it will be impossible, or extremely difficult (and unnecessarily so) at best, for defendants to obtain highly relevant records and documents in the custody of those railroad corporations that are not made parties to the action. However, if they are all made parties they will all have

to respond to defendants' requests for discovery and produce whatever relevant documents they may have in their possession. Most certainly, this would facilitate the discovery process, speed up the proceedings, and permit the parties to fully present their various positions. The Court would thereby, and only thereby, be enabled to make the just and informed decision which this significant and far-reaching case demands, based on all of the relevant evidence. Unless defendants misread Rule 20, F.R.C.P., its provisions for permissive joinder are very broad and the Court may make such orders as will prevent delay and injustice. Both delay and injustice will be prevented by making all of the railroad corporations parties to this action, and no hardship can result as they are all represented by the same attorneys and

take the same positions.

As important as the missing tax records and other documents mentioned are, and plaintiffs know just how important they really are, they are not the most important of the missing documents requested by defendants. The exhibits, stipulations of UPRR, and other documents introduced in the Radke case in the District Court of Logan County, Colorado, are extremely relevant to and admissible in evidence in this action. Defendants were advised by the Clerk of the District Court of Logan County, Colorado, that on November 1, 1977, three days after the instant case was filed, Union Pacific attorneys withdrew all of these documents from the District Court file in that case. Defendants called for production of these documents in their Second Request, and we specifically referred to

the deposition of one Harry A. Swanson in my letter to the Court of May 3. In response, Mr. Kidd, on page three of his letter, advises the Court that plaintiffs will produce the deposition transcript before trial although defendants, as he sees it, have no justification for its discovery. Mr. Kidd makes no reference to the other documents withdrawn from the court file and called for by defendants. Mr. Williams has now notified defendants that plaintiffs intend to introduce the deposition transcript at trial, and he sent along a photocopy of the transcript. He also makes no mention of the other withdrawn documents. It is obvious that plaintiffs have no intention whatever of producing the withdrawn documents or any other documents adverse to the railroad's case, and yet they themselves have complete

access to and control of them and can use them for their own purposes. Plaintiffs can always claim that they do not have these Radke documents, as the documents were withdrawn by nonparty Union Pacific attorneys and not by plaintiffs' attorneys.

And so the railroad's clear strategy is that, through plaintiffs, on the one hand to resist every effort by defendants to make discovery, and on the other hand and at the same time to push for a premature determination of the case before the truth can be forced out. The railroad's ultimate purpose, through these tactics, is to literally "steal" this case and the millions of acres of oil and gas rights that will be determined by its outcome. Plaintiffs' initial thrust is to accuse defendants of undue delay which will substantially

prejudice them because they have cleared their calendars, etc., even though they had three weeks notice of defendants' request for a postponement, and even though they themselves waited six full days before complaining. Plaintiffs would, of course, much prefer to take the case to trial six months after they launched their blitzkrieg attack, with the assistance of the Court, which has kept defendants' backs against the wall with precious little time for discovery. The railroad would prefer (and understandably so, knowing what they know about their records and the Radke case file) that the case be decided on its evidence rather than on all of the evidence. It knows what will happen if the truth comes out at trial. If the railroad cannot force through this quick and premature determination on a trun-

cated and disjointed record, then we will see just how difficult it is going to be for defendants to obtain their discovery if all of the railroad corporations are not made parties to the action. And we will also see just where the fault really lies for any unnecessary delay in the proceedings. The railroad would much prefer to try in six months, without the relevant evidence, an issue which took it 31 months to try in the Radke case, at which time the UPRR, not then reorganized, was the only defendant and had all of its records which could easily be discovered without arguments over proper parties.

In retrospect, this case could not have been tried in six months time under ideal condition , let alone under the conditions which defendants have endured. Whatever unnecessary delay there has been to date is not the fault of defen-

dants. It has come from the blitzkrieg-type sneak attack which distracted defendants from their discovery in order to defend against summary adjudication of the case, from the inadequacy of plaintiffs' pleadings (it is plaintiffs, not defendants, who just recently amended their complaint to put the railroad's alleged title to the oil and gas estate in issue, and it is plaintffffs who have not yet replied to defendants' Counterclaim), from the setting of impossible discovery and other deadlines, and from the constant and unremitting pressure for a quick and premature determination of the case. This all has its genesis, of course, in Amoco's initial misrepresentations to the Court as to the meaning and legal effect of its lease and as to the certainty of the railroad's title to the oil and gas estate.

These misrepresentations apparently induced the Court to issue the restraining order without notice and gave the Court to understand that defendants had no claim to the oil and gas and were merely obstructing Amoco by not letting it on their lands to drill a well. The railroad was at all times very familiar with both the Strohacker and the Radke cases, and knew full well that in the only two state court cases where the land grant railroads had claimed the oil and gas estate in land grant lands under a reservation of coal and other minerals, the railroads lost hands down both times. In 1929 the UPRR settled a case on the same issue in the District Court of Uinta County, Wyoming, rather than let it go to trial. Rather than face the music in another state court, the railroad went forum shopping and brought this action

in federal court. The railroad knew the situation, and yet it gave the court to understand the opposite. The plaintiffs certainly did not represent the true situation to the Court at the initial hearing held November 3, 1977, which defendants' attorneys were unable to attend and could not get continued. They chose at that hearing to represent to the Court that my assertion that the landowners owned the oil and gas estate was based on a nonexistent variation between the contract and the deed, when in fact Joe Larkin, the railroad's landman, and I had discussed and disputed, time and again, the issue of whether the coal and other minerals reservation with attendant mining rights reserved the oil and gas.

By obtaining the restraining order through its misrepresentations, the railroad also succeeded in putting the Court

in what appears at least to be an awkward position, in that, from that point on, the Court could not finally rule in defendants' favor without criticizing the restraining order it had previously issued without notice to defendants, and without one federal district judge having to overrule the actions of another federal district judge. Because of the restraining order, a dry hole has now been drilled on defendants' lands, and this can only aggravate the problem. For now, for the Court to rule in defendants' favor is to acknowledge it has harmed and damaged defendants by issuing and keeping in effect the restraining order which led to the dry hole. But if the Court rules in favor of the railroad, then no harm has been done. I would imagine that this built in "tilt" which the railroad has engineered through

these misrepresentations makes it feel very comfortable and secure.

In defendants' view, the biggest problem of all is that the Court, in spite of everything, insists on deciding the case itself, rather than remitting the issue to the state courts for determination. If the railroad runs 450 miles through Wyoming, then, at 20 sections per mile, the UPRR has been granted 9,000 square miles, or over 5,700,000 acres, of land in the State of Wyoming, which would constitute almost 10% of the entire land area of the state. How much of this land has been sold off by the railroad with some form of mineral reservation or other, and how many landowners might be involved with these reservations, can only be speculated on in light of present knowledge, but the numbers must be very large indeed. The outcome of this

case may well affect millions of acres of land and thousands of landowners, or even tens of thousands of landowners if town lots are considered. Literally billions of dollars could be involved, and most of the oil and gas activity and the major discoveries are in the southwestern part of the State. The case is simply too big, too far-reaching, for anything but an authoritative determination, which can only be made by the Wyoming Supreme Court. Defendants are too far removed from the federal court, and the Court is too far removed from the land and the activity. This is strictly a diversity case. If there were any federal question involved, the plaintiffs would have raised it to the Court long ago. The Wyoming state law pertaining to the issue and controlling in the case is practically nonexistent,

and the Wyoming Supreme Court could go any different number of ways. There is no earthly reason for this case to remain in the federal courts where it can never be authoritatively decided, and this Court is not required to do so because of its mandate to exercise jurisdiction. It need not accommodate the railroad's forum shopping tactics. This is a case with the requisite "special circumstances" to justify the invocation of the doctrine of abstention, and the mandate does not run that far. Again, because of the conditions defendants have labored under, and with our very limited resources, we have simply not had the time to adequately brief the abstention issue for the Court. It may not have mattered, as the Court at an earlier hearing ruled on the matter even before the plaintiffs, with all of their resources, filed their

brief on the issue. Yet the better authority is for the proposition that in a case such as this the federal courts should decline or defer the exercise of their jurisdiction and remit the issue to the state courts for determination.

We respectfully renew our request that the trial date be postponed, that the pre-trial conference scheduled for May 19 be changed to a preliminary pre-trial conference under District Court Rule 8(b), that we be granted our discovery, and that we be granted the necessary time to develop and prepare our case. We would expect to continue to pursue the abstention issue.

Respectfully,

/s/ Charles D. Phillips
Charles D. Phillips

cc: Mr. Williams
Mr. Kidd
Mr. Houck
Mr. Troughton
Clerk of Court

I

The Plaintiffs and the Court, by their actions and conduct of this case, have taken Defendants' property without due process of law, and have deprived Defendants of their right to a fair trial before an impartial judge.

This action was originally brought on October 27, 1977, by Amoco Production Company ("Amoco"), as alleged oil and gas lessee of Champlin Petroleum Company ("Champlin"), for injunctive relief only, against defendants as owners of a section of land in Uinta County, Wyoming (Section 7, Township 14 North, Range 117 West of the 6th P.M.), to restrain and enjoin defendants as owners and in possession of said lands, from preventing Amoco from entering upon the leased portion of said lands and drilling a test well and from interfering with Amoco's operations

thereon. Champlin, Amoco's lessor, was not a party to the action and was not made a party by Amoco. The Complaint contained no allegations whatever that Champlin, or anyone else, was the owner of the oil and gas estate in said lands. It alleged that, under paragraph 3 of the lease, the lease would terminate if Amoco did not commence the drilling of a test well within three months from the date of lease (October 6, 1977), and that defendants would not let Amoco drill a test well on their lands. The Complaint totally omitted any reference to other provisions of the lease (paragraphs 10 and 16) which, in the circumstances, completely exonerated Amoco from the three-month drilling requirement. Nor did the Complaint allege any necessity for drilling on defendants' lands because of the unavailability of other leased

lands upon which Amoco could drill.

Strictly on the basis of the lease, as misrepresented by Amoco to the Court, and without notice to defendants or reason for absence of notice, a temporary restraining order as requested by Amoco was issued against defendants by the Honorable Clarence A. Brimmer, District Judge, and the case was then assigned to the Honorable Ewing T. Kerr, District Judge. The temporary restraining order set down Amoco's request for preliminary injunction for hearing on November 3, 1977. Defendants were not served until Sunday, October 30, 1977, less than four full days before the time set for the hearing on preliminary injunction. Although defendants and their attorney lived more than 350 miles from Cheyenne and were irrevocably committed on other matters and could not attend, they were

denied a continuance, and the hearing on preliminary injunction was held as scheduled in defendants' absence. A great deal of misleading hearsay and non-expert opinion testimony was received by the Court in evidence, without being subjected to cross-examination and without opportunity for rebuttal. At the conclusion of the hearing, the Court advised Amoco that the matter would not be delayed and that it could proceed as though it already had a permanent injunction. In other words, Amoco was advised by the Court that it could proceed with its drilling operations on defendants' lands as though it already had a final adjudication in its favor, even though defendants had had no reasonable opportunity to appear in court and defend themselves. The Court continued the temporary restraining order in effect and

gave defendants ten days to file any memoranda in opposition to the entry of a permanent injunction.

Defendants, within the time allowed, filed their motions to dismiss the complaint and to dissolve the temporary restraining order. The motion to dismiss attacked the Complaint for failure to state a claim, in that it contained no allegation or request for adjudication of title, and because the lease itself prohibited Amoco from drilling a well and exonerated it from doing so due to causes beyond its control. The motion to dismiss further attacked the complaint for failure to join indispensable parties, namely, the railroad parties supposedly the owners of the oil and gas estate upon whose title Amoco's lease rights depended. The motion to dissolve attacked the temporary restraining order as issued in violation of the require-

ments of Rule 65, of the Federal Rules of Civil Procedure, as being unsupported by factual allegations showing urgency, irreparable harm or inadequate remedy at law, as drastically altering the status quo to defendants' irreparable harm from a test well being drilled on their lands, and as failing to state a claim or join indispensable parties. Defendants filed briefs as time permitted in support of their motions, further alleging that Amoco, by the peculiar nature of its pleadings, was acting as a "cat's paw" for the real parties in interest, the Union Pacific railroad parties, by attempting to obtain through the device of injunctive proceedings a quick and unfair permanent injunction which would constitute at least a de facto recognition of the railroad [1/] as

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1/ The Union Pacific Railroad Company, seller and grantor in the transaction with

owner of the oil and gas estate without the railroad's purported title being put in issue and subjected to an adverse adjucation.

Defendants' motions were set for hearing in Casper on November 23, 1977, and due

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1/ C. L. Byrne for the sale and purchase of the lands in question, at all times up to 1971 owned whatever rights were reserved in the contract and deed to said lands. In that year, the Union Pacific Railroad Company apparently reorganized itself into several interlocking corporations, namely, plaintiffs Champlin Petroleum Company and Union Pacific Land Resources Corporation, the Union Pacific Railroad Company itself, Upland Industries, Inc., and the Union Pacific Corporation, and possibly others. Defendants understand Union Pacific Corporation to have been created, as part of said reorganization, as a holding company, and that said Union Pacific Corporation now wholly owns the Union Pacific Railroad Company and all of the corporations created by the reorganization, either directly or through its wholly-owned subsidiary corporations wholly owning other subsidiary corporations. Since the reorganization, the railroad's claimed interest in land grant lands have been transferred out of the Union Pacific Railroad Company to other subsidiary corporations with further transfers thereafter, and the stock of some of these subsidiary corporations transferred to other of the corporations. Whatever interests in the lands in question the Union Pacific Railroad Company might have reserved in its transaction with C. L. Byrne appear to have passed to plaintiffs Champlin and UPLRC, but defendants cannot be sure of this. Nor can defendants

to adverse weather conditions the date was changed at the last minute to November 30. At the hearing held November 30, Champlin and Union Pacific Land Resources Corporation ("UPLRC") each filed, without prior notice to defendants, its separate Joinder, Adoption of Pleadings and Consent by which each of them joined with Amoco as a plaintiff in the action as an alleged owner of the oil and

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1/ be sure of the present location and custody of the Union Pacific Railroad Company's records in connection with the transactions. Defendants' discovery requests for documents establishing the relationship between the various railroad corporations and for the records relevant to the transaction with C. L. Byrne were, in the main, denied by the Court.

In any event, defendants view the 1971 reorganization, and any other reorganizations, more as matters of form than of substance insofar as the case at bar is concerned. In defendants' view the real parties in interest in this action are the Union Pacific Railroad Company and/or the Union Pacific Corporation, as one or the other, or both, wholly own all of the other subsidiary corporations created by the reorganization. By its use of the term "railroad" in this memorandum, defendants mean to include the Union Pacific Railroad Company and all of the corporations

gas estate, adopted Amoco's pleadings, and consented that the action proceed upon the hearing at the time set by the Court. No request was made in the Joinder pleadings for adjudication of title to the oil and gas estate. It should be noted that UPLRC's Joinder pleading was dated November 30, 1977, and consented to a hearing at that time as scheduled, but that Champlin's Joinder pleading was dated November 23, 1977, and consented to a hearing on that date. Neither of these new plaintiffs notified defendants of their intention to join as plaintiffs, even though Champlin, at least, had at least a

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1/ created by the reorganization. The general reference is easier, and probably more accurate, than trying to keep the various railroad corporations straight, especially when defendants do not have the particulars of the reorganization or of the transfers of interests subsequent thereto.

week to do so. The fact that each Joinder pleading was dated for the same date that the hearing was stated in the pleading to be held, and the fact that no notice of intended joinder was given defendants beforehand in either case, can only suggest to defendants that the lack of notice in each case was deliberate, and that the joinders were either forced by defendants' motion to dismiss for lack of indispensable parties or were a part of a preconceived plan by Amoco and the railroad for Champlin and the UPLRC to join at the last moment in order to justify an adjudication of title to the oil and gas estate in the railroad's favor in connection with the summary issuance of a permanent injunction against defendants. As defendants had argued in their memorandum supporting their motion to dismiss for failure to join indispensable parties, if Amoco was

really serving as a "cat's paw" for the railroad, the railroad's joinder with Amoco seeking injunctive relief would expose the whole thing, as Amoco and the railroad would then both be asking the Court for injunctive relief in favor of Amoco against defendants because of Amoco's lease with the railroad, when in fact the railroad could itself grant that relief simply by extending the drilling period until the issue of the ownership of the oil and gas estate could be adjudicated by proper and regular judicial proceedings. At the hearing held November 30, defendants again raised these matters to the Court and requested dismissal of the Complaint and dissolution of the temporary restraining order, after which plaintiffs, all represented by the same attorney, made their expected strong pitch for an immediate permanent injunction and final adjudication, even before

defendants had filed a responsive pleading to Amoco's Complaint. The Court denied defendants' motions to dismiss and dissolve, refused to issue a permanent injunction at that time, further continued the "temporary" restraining order in effect, gave defendants ten days to serve their Answer, and ordered all discovery completed within 30 days. The 30-day deadline for completion of discovery was imposed even though defendants had advised the Court that discovery could be tedious and time consuming, and even though there was no way discovery could be completed in that time. It was and still is defendants' firm contention and belief that the pleadings and the arguments at the hearing conclusively established that plaintiffs had failed to state any claim for injunctive or other relief whatever, and that plaintiffs'

game had been exposed and their case should have been thrown out of court at that point. It should be noted that at the time of the hearing, the temporary restraining order had already been in effect for a month and that Amoco was actively drilling what turned out to be, as feared by defendants, a dry hole.

On December 12 (December 10 being a Saturday), defendants filed their Answer and Counterclaim. Their Answer reasserted the defenses raised by their motions to dismiss and to dissolve, and raised the additional issue of abstention. Their Counterclaim alleged their ownership of the oil and gas estate, requested an adjudication thereof in their favor, joined as Additional Defendants the Union Pacific Railroad Company ("UPRR") and Upland Industries Corporation ("upland"), and included the abandoned

right of way as part of the lands on which they sought an adjudication of title. By letter of the same date to Judge Kerr (copies to counsel), defendants expressed their concern to the Court over the continuance in effect of the restraining order and the test well being drilled under its protection, requested an early hearing of the first five defenses contained in their Answer in advance of discovery or pretrial, and enclosed a copy of the Arkansas case of Missouri Pacific Railway Company v. Strohacker, 152 S.W.2d 557 (Ark. 1941), holding that a reservation of "all coal and mineral deposits" and mining rights incident thereto in a deed to land grant lands did not reserve the oil and gas, in an effort to show that defendants' claim of ownership of the oil and gas estate was substantial, and to persuade the Court that the drill-

ing should cease until the issues were determined. Copies of defendants' letter to the Court and of the Strohacker case were sent by defendants to the Clerk of Court for filing, but according to the docket sheet they were never filed. No response was ever received by defendants from the Court to their request for an early hearing on their first five defenses. Instead, on January 6, 1978, seven days after the 30-day discovery deadline had passed and nine days after plaintiffs had served their Reply to defendants' Counterclaim, the Court set the case for non-jury trial on March 9, 1978, without ever having consulted with or notified defendants and without a pre-trial conference having ever been mentioned or discussed. At this time, plaintiffs had never, in any manner, put in issue the railroad's purported ownership of the oil and gas estate. During all of

this time and afterwards, defendants were unable to obtain a copy of the local District Court Rules as they were being revised.

Because they were awaiting a response from the Court to their request for an early hearing on the first five defenses contained in their Answer, and because they firmly believed that the plaintiffs had failed to state any claim for relief and that plaintiffs' case would be thrown out after the hearing, defendants did not at once embark on discovery proceedings which they felt, and still feel, were useless and unnecessary at that time in light of the shortcomings in the original Complaint. After receiving the order setting the case for trial, and when it became obvious that they would receive no consideration from the Court on their request for an early hearing in advance

of discovery, defendants began to prepare a comprehensive discovery request for production of documents, and on February 7, 1978, defendants served upon the plaintiffs and Additional Defendants their First Request for Production of Documents, in 29 separate paragraphs, requesting documents believed by defendants to be highly relevant to the issues of this case. To defendants' First Request, plaintiffs on February 16, 1978, filed their objections, complaining, among other things, that the time for discovery had elapsed, and that plaintiffs were not required by the Rules to respond to defendants' discovery requests until after the date set for trial. By Order dated February 17, 1978, the Court struck the May 9 date for trial and set plaintiffs' objections and the motions of plaintiffs and of Additional Defen-

dants for hearing on March 7, 1978. By plaintiffs' Notice dated February 22, defendants' request of December 12, 1977, for an early hearing in advance of discovery on the first five defenses in their Answer was added to the agenda for March 7. After the hearing, and after some controversy between the parties, the Court on March 31, 1978, signed an order dismissing the action as to the Additional Defendants, sustained plaintiffs' objections to paragraphs 8 through 29 of defendants' First Request for Documents, denied plaintiffs' objections to paragraph 7 of plaintiffs' First Request but only as they related to the Section 7 lands covered by the lease, denied defendants' third and fifth defenses of their Answer as to indispensable parties and abstention, and let stand without ruling defendants' first,

second and fourth defenses of failure to state a claim for any relief, failure to state a claim for injunctive relief, and wrongful issuance and continuance in effect of the "temporary" restraining order. The Court further continued the "temporary" restraining order in effect and ordered the requested documents as to which plaintiffs' objections were overruled to be produced in Cheyenne on April 5.

On March 30, 1978, plaintiffs served their Motion and Notice of Motion for leave to amend their Complaint, and by letter of the same date to Judge Kerr advised the Court and counsel that the test well had been completed as a dry hole but that Amoco intended to keep the lease in effect by payment of delay rentals. The proposed Amended Complaint, proffered only after the dry hole had been

completed to defendants' irreparable harm under the "temporary" restraining order, for the very first time put in issue the railroad's purported ownership of the oil and gas estate, and requested an adjudication thereof in its favor along with injunctive relief even though the dry hole had been completed. It is noted that while the Amended Complaint reiterated the allegations of the original Complaint as to irreparable harm, etc., when this was no longer possible under any theory of the case, the fact of the completion of the test well as a dry hole was not at that time made a matter of record filed with the Clerk of Court, but was passed along outside the record in a letter to the Judge. At the time of completion of the dry hole the plaintiffs had obtained all of the relief requested by their original Complaint

and had no further case to pursue. The Court promptly set plaintiffs' motion for leave to file their Amended Complaint for hearing on April 5.

On April 5, in Cheyenne, plaintiffs produced a mass of documents, in photocopy form, more than eight inches high, in response to defendants' First Request for Documents, and the cataloging alone of these documents took the greater part of the day. A break was taken at 10:30 a.m. for the hearing on plaintiffs' motion for leave to file their Amended Complaint, which was granted by the Court over defendants' objections that at the time the dry hole was completed plaintiffs had obtained all of the relief they had requested and they had no further case to pursue, and at plaintiffs' request, in chambers off the record, a tentative trial date of May 22 was agreed

upon together with a tentative pre-trial date of May 19. Orders were issued accordingly, except they did not describe the settings as tentative. The parties after the hearing pursued to completion the cataloging of the documents produced. Subsequent examination by defendants of the documents produced disclosed that plaintiffs had not produced all of the documents required by the Court's Order, and that plaintiffs had used paragraphs 8 through 29 of defendants' First Request for Documents, to which plaintiffs' objections had been sustained, to produce numerous self-serving documents which were not required. The documents actually produced further disclosed that a great deal more discovery was necessary, and after attempting to analyze and digest the great mass of documents produced, defendants commenced

the preparation of their Second Request for Production of Documents. In the meantime defendants prepared and on April 25 served their Answer and Counterclaim to Plaintiffs' Amended Complaint, and joined as Additional Defendants the Union Pacific Corporation, Union Pacific Railroad Company, and Upland Industries.

After hopefully having digested the mass of documents produced by plaintiffs and having prepared and served their Answer and Counterclaim to Plaintiffs' Amended Complaint, defendants prepared and on May 1 served on defendants their Second Request for Production of Documents, requesting of plaintiffs and Additional Defendants, in 19 paragraphs, documents in the possession of plaintiffs or Additional Defendants which from defendants' first production were obviously relevant and had not been produced,

On May 2, defendants wrote a three and a half page letter to the Court (copies to counsel), requesting a postponement of trial until after they could complete their discovery and prepare for trial, and explaining the necessity for the postponement and for the additional documents. In light of subsequent events, this letter, which was later responded to by plaintiffs and argued before the Court, became one of defendants' most important documents, constituting both a motion and a brief in support thereof, but although a copy of the letter was forwarded to the Clerk of Court for filing, the letter was never filed according to the docket sheet. Defendants received no response from the Court to their letter of May 2, and no response from plaintiffs until Mr. Kidd's letter of May 8 accusing defendants of attempting

to unduly delay the resolution of the case but setting forth no good reason why defendants would wish to do so. This letter, which was mailed the afternoon or evening of May 8, was not received by defendants until May 10, and by this time defendants were already in default of the 10-day in advance requirements of the Order for Pre-Trial Conference. On May 9, Mr. Williams, plaintiffs' chief attorney, served on defendants his Plaintiffs' Pre-Trial Statement of Issues, Legal Theories and Positions, his Plaintiffs' Witness List and Summary of Testimony, and his Motion to Set Aside and Vacate Document Request and Terminate Discovery with supporting memorandum, and advised the Court and defendants by letter to Judge Kerr of the same date that if plaintiffs' objections to further discovery were sustained at the hearing

on May 18, plaintiffs would anticipate that pre-trial and trial would proceed on May 19 and May 22 as scheduled. These letters and instruments were also received by defendants on May 10. On May 12, plaintiffs served on defendants their Motion of Union Pacific Corporation to Dismiss Defendants' Amended Counterclaim, their notice that the Union Pacific Corporation would bring said motion on for hearing on May 18, and their Reply of Plaintiffs to Defendants' Amended Counterclaim. By letter of the same date Mr. Kidd so advised the Court. With accompanying letter of transmittal of that date, Mr. Kidd served on defendants the plaintiffs' Exhibits 9 through 24.

On May 12, 1978, by seven and a half page letter to Judge Kerr (copies to counsel, and to the Clerk of Court for filing but never filed), defendants res-

ponded to Mr. Kidd's accusatory letter of May 8, setting forth defendants' explanation for the delays, if such there were, commenting on the failure of plaintiffs to produce certain documents, the means by which plaintiffs (and the railroad behind them) were controlling the evidence, the necessity of joining Union Pacific Corporation, Union Pacific Railroad Company and Upland Industries as proper parties in the action for discovery purposes, the railroad's strategy in choking off defendants' discovery and forcing an early decision so as to "steal" the case, the delays caused by actions of plaintiffs and the Court, the misrepresentations by plaintiff as to the terms and legal effect of the oil and gas lease, the awkward position of the Court in rendering an impartial decision because of its wrongful issuance and continuance in effect of the "tempo-

rary" restraining order (it is still in effect) and the dry hole drilled thereunder on defendants' lands, the importance of the case as affecting millions of acres of oil and gas rights in Wyoming and thousands of landowners including homeowners, and the necessity for abstention by the federal courts so that an authoritative determination of the ultimate issue could be made by the Wyoming Supreme Court. Again, this letter, so important to defendants' case, was never filed although a copy was forwarded by defendants to the Clerk of Court for filing.

Not until May 16 did defendants receive from the Court any response whatsoever to their request by letter of May 2 for a postponement of trial and for further discovery of documents. On that date defendants received the Judge's letter addressed to all counsel, dated

May 15, stating that counsel would be expected to be prepared for trial on May 22, and that as the Judge understood the issue it was largely one of law rather than fact. At this time plaintiffs' objections to defendants' Second Request for Production of Documents had not even been argued or ruled upon by the Court.

At the hearing held May 18, defendants again advised the Court that they were completely unprepared for trial, and suggested that if the Court intended to rule on the case as a matter of law, as indicated in its letter to counsel of May 15, then a summary judgment procedure might be more appropriate, but if there was to be a trial then defendants needed their discovery and time to prepare their case. The Court thereupon advised defendants that a motion for summary judgment

would be denied by the Court, and announced that there was going to be a trial on May 22 as scheduled. This, in spite of the fact that defendants had no time to prepare a case either before or after the hearing held May 18, that they had been restricted in their discovery to matters largely meaningless, that they had been furnished only such "evidence" as the plaintiffs had chosen to spoon-feed them for plaintiffs' own purposes, and that all the while defendants had been excluded from the most significant evidence in the case (the railroad's own records). The Court at the hearing of May 18 summarily sustained plaintiffs' objections to defendants' Second Request for Production of Documents and terminated further discovery, dismissed the case as to the Additional Defendants joined by defendants in their Counterclaim, denied

defendants' request for a postponement of trial, and ordered that the pre-trial conference and the trial be held as scheduled.

The position and rulings of the Court at the May 18 hearing strike defendants as being particularly inconsistent and anomalous. All are agreed that the ultimate issue in this case is whether or not the Union Pacific Railroad, by the reservation of "coal and other minerals" with incident "mining rights" contained in its contract with C. L. Byrne and its deed subsequently issued to his devisees, reserved the oil and gas estate in defendants' lands, and that this depends upon the intent of the parties, especially the grantor, at the time the contract was entered into. It the instrument is unambiguous and the intent of the parties can be ascertained from the language of the

instrument itself, then as a matter of law the intent of the parties must be ascertained from the four corners of the instrument itself, and extrinsic evidence is inadmissible. On the other hand, if the language of the instrument is ambiguous and can be reasonably interpreted two or more different ways, then extrinsic evidence as to intent is admissible and the traditional rules of construction apply. The Court by its letter of May 15 indicated it viewed the issue as one of law, not of fact. Yet the Court rejected defendants' suggestion that if the issue were one of law, because the contract and deed were unambiguous, a summary judgment procedure might be more appropriate as it would save a lot of useless discovery and arguments over discovery, and stated that if plaintiffs had moved for summary judgment the Court

would deny the motion. It is also of interest that the plaintiffs, while arguing from the beginning that the reservations unambiguously reserved the oil and gas estate, did not move for summary judgment on that basis.

By definition, a trial involves the resolution of one or more issues of fact, to be determined only after consideration of all of the relevant evidence. In the case at bar, the ultimate question being the intent of the parties, a trial and a resort to extrinsic evidence is necessary only if the reservation is ambiguous. Plaintiffs by implication recognize the ambiguity by refusing to bring a motion for summary judgment. The Court by implication recognizes the ambiguity by rejecting any idea of a summary judgment proceeding and forcing the case to trial. Yet, while both the Court and the plaintiff have taken the position

that the issue is one of law rather than fact, they have coerced the defendants, completely unprepared, into a "trial", at the same time denying defendants their discovery on the very issue requiring a trial to begin with.

At the pre-trial conference held May 19, defendants were completely unprepared, as they had for so long advised the Court that they would and must be, having been wrongfully denied their discovery and their right to adequately prepare and present their case. The Court was advised by defendants that they would have only a few exhibits, mostly gleaned from the self-serving production of documents plaintiffs had made on April 5, and that they would on such short notice not be able to present any witnesses. It was, after all, a Friday, with the trial to commence the following Monday, and defendants had learned only the day before

that they would be denied their discovery and that the trial would proceed as scheduled. Defendants' witnesses were 357 miles from the Court with only the weekend for defendants' attorney to return from Cheyenne, line up the witnesses, and have them in Cheyenne the following Monday morning for trial. This in addition to generating what evidence they could from the documents produced by plaintiffs. The impossibility of accomplishing all of this is obvious. At the conclusion of the pre-trial conference the Court advised defendants that it would receive in evidence any exhibits offered by defendants, which is precious little help if, because of time limitation and denial of discovery, there are very few exhibits to offer.

At the trial held Monday, May 22, the parties offered their exhibits in evidence and the plaintiffs witnesses

testified. Contrary to what the Court had informed defendants of at the pre-trial conference, the Court rejected defendants' very important Exhibit I, consisting of properly certified copies of the entire court file in the case of Louise E. Callister v. Union Pacific Railroad Company and Frank Wilcox, Civil Action No. 117-L, in the District Court of Uinta County, Wyoming. Because of a misunderstanding as to the time the trial would commence the next day (Tuesday), defendants offered no further evidence, plaintiffs offered no rebuttal evidence, and the trial adjourned.

Defendants submit that throughout the entire proceedings, from beginning to end, this case has been handled by plaintiffs and the Court in an arbitrary, unfair and unlawful manner, beginning with the issuance of the temporary res-

training order without notice to defendants on the basis of a Complaint and a lease which on their faces failed to state a claim for injunctive or other relief, and culminating in the denial of defendants' discovery requests and forcing the case to trial for no good reason when defendants were completely unprepared. By denying defendants' motions to dismiss and to dissolve the restraining order, a dry hole has been drilled by Amoco on defendants' lands to their irreparable harm. The Court, because of Amoco's initial misrepresentations which led to the issuance of the "temporary" restraining order, and because of the Court's own refusal to dissolve the restraining order when it was obvious it should do so, is in a position where it must decide this case in favor of plaintiffs, for to do other-

wise is to acknowledge it has wrongfully and irreparably harmed defendants by permitting the dry hole to be drilled on defendants' lands before the ultimate issue of the ownership of the oil and gas estate was decided. To put it another way, for the Court to now decide the case in defendants' favor is to acknowledge that the Court, by its own actions, has taken defendants' property (the exploration and drilling rights in defendants' lands and the value of the oil and gas lease and sale rights) without due process of law and given this property to plaintiffs. Only by ruling in favor of plaintiffs can this result be avoided. Defendants further submit that the Court was wrong in imposing a 30-day deadline for completing all discovery at a time when defendants had not even filed an Answer to the Complaint,

in setting the case for trial without consulting defendants shortly after the 30-day discovery period had elapsed, and in failing to respond to defendants' request for an early hearing on the first five defenses contained in their Answer. Defendants further submit that the Court was wrong in denying defendants the discovery they requested in their First and Second Requests for Production of Documents, in forcing the case to trial rather than treating the matter as one for summary judgment proceedings when the Court looked upon the issue as one of law rather than fact, in failing to respond to defendants' request of May 2 for postponement of trial until defendants position was hopelessly compromised and then denying the request, and in forcing defendants to trial when they were completely unprepared and when there was no good reason for doing so. Defendants

further submit that the Court was wrong in not abstaining from exercising its jurisdiction in this important and far reaching case upon which not only billions of dollars might be involved but also the very security of titles to land and homes of thousands of Wyoming citizens. Where so much is wrong with a case, as defendants see it, where everything from beginning to end has been handled in a manner so arbitrary, unfair and prejudicial to defendants' fundamental rights, it is next to impossible to set out and analyze all of the allegedly erroneous matters. The Court has stated time and again that it viewed the case as a very simple matter, that as a matter of law the word "minerals" includes oil and gas and that the railroad's deed reserved these substances, and yet the Court has forced the case to a premature trial.

The Court has demonstrated throughout these proceedings its impatience with defendants and their position that they own the oil and gas estate in their lands. It has ruled in each and every instance in favor of plaintiffs, exactly as the plaintiffs have requested and often in a summary fashion, without permitting defendants to complete their arguments or at times to argue at all. The attitude of the Court, as it strikes defendants, is that the Court's calendar and its reputation for "moving litigation along" are more important than the necessities of the case, the interests of justice, and the rights of the parties to a fair trial. The facts and the record must speak for themselves, and citations of authority would not be particularly helpful. The comment of Judge Murrah in the case of Avrick v. Rockmont Envelope Co.,

155 F.2d at page 573, however, seems appropriate:

> "An expetitious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court."

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-215K

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs,

vs.

GUILD TRUST, ET AL.,

Defendants.

(Filed January 5, 1979)

ORDER DENYING DEFENDANTS'
MOTION FOR NEW TRIAL

The above-entitled matter coming on regularly for hearing before the Court on defendants' Motion for New Trial dated December 11, 1978 and plaintiffs' Response thereto of December 28, 1978; and the Court having considered, in addition to said Motion and Response, the entire brief filed by the defendants after trial, including specifically the late

filed supplemental portion thereof filed on December 1, 1978 after the Court's final deadline for the submission of briefs and after the Court's Opinion and Judgment of November 29, 1978 had been entered, as well as the Memorandum Brief of plaintiffs timely filed September 5, 1978, and the Court having reviewed each of its rulings that are complained of in the defendants' Motion for New Trial and having found no error therein, and the Court further finding that no good ground exists for a new trial in this case, and being fully advised in the premises; the Court finds as follows:

1. That the authorities cited in defendants' brief do not support their contention that there is a generally recognized rule of law or a rule of Wyoming law under which the mineral

reservation in this case must be deemed ambiguous;

2. That, as indicated in authorities cited at page 6-7 of the Court's Memorandum Opinion of November 29, 1978, at least in Wyoming the term "mines" has long included oil and gas extraction sites and the term "to mine" has long included the process of extracting oil and gas from the earth, and therefore the inclusion of these terms in the reservation in this case does not introduce any ambiguity into the reservation under Wyoming law;

3. That the Court's holding that the reservation at issue is unambiguous and severs the mineral estate from the surface, including the oil, gas and associated liquid and gaseous hydrocarbons, and reserved the mineral estate to the grantor, was based on the totality

of the authorities and considerations discussed in its Memorandum Opinion, and not solely on Burke v. Southern Pacific Railroad Co., 234 U.S. 669 (1914), and Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), which cases the Court nonetheless considers to exemplify the settled unambiguous meaning of the language of the reservation;

NOW, THEREFORE, IT IS

ORDERED that defendants' Motion for New Trial be, and the same is hereby denied.

Dated this 5th day of January, 1979.

/s/ Ewing T. Kerr
U. S. District Judge

EXHIBIT F

SEPTEMBER TERM - OCTOBER 9, 1979

Before Honorable Robert H. McWilliams and Honorable Monroe G. McKay, Circuit Judges.

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs-Appellees,

vs.

GUILD TRUST, ET AL.,

Defendants-Appellants.

No. 79-1236

The Court has the following for consideration in the captioned case:

1. Appellants' motion to stay proceedings and to abstain or in the alternative for certification of questions of state law to the Wyoming Supreme Court. Appellees filed a response in opposition to the motion.

2. Appellants' motion to file an untimely oversize brief.

3. Motions of the State of Wyoming and Anschutz Land & Livestock Company, Inc. for leave to file briefs amicus curiae.

Upon consideration whereof, the Court orders:

1. Appellants' motion to stay and abstain or to certify questions of state law is denied.

2. Appellants' oversize brief is filed as of September 21, 1979.

3. Motion of the State of Wyoming and Anschutz Land & Livestock Company, Inc. to file briefs amicus curiae are denied.

HOWARD K. PHILLIPS
Clerk

/s/ Robert L. Hoecker
By:
Robert L. Hoecker
Chief Deputy Clerk

EXHIBIT G

NOVEMBER TERM - JANUARY 7, 1980

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James K. Barrett, The Honorable William E. Doyle, The Honorable Monroe G. McKay, The Honorable James K. Logan, and The Honorable Stephanie K. Seymour, Circuit Judges

AMOCO PRODUCTION COMPANY, ET AL.,

Plaintiffs-Appellees,

vs.

GUILD TRUST, ET AL.,

Defendants-Appellants.

No. 79-1236

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc on appellant's motion to stay, abstain or certify questions of state law.

Upon consideration whereof, the petition for rehearing is denied by Judges

McWilliams and McKay.

The petition for rehearing having been denied by those judges who denied the subject motion and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker

By: Robert L. Hoecker
Chief Deputy Clerk

EXHIBIT H

JULY TERM - September 12, 1980

Before Honorable Robert H. McWilliams, Circuit Judge

AMOCO PRODUCTION COMPANY, ET AL.;

Plaintiffs-Appellees,
Defendants-Appellees,

vs.

GUILD TRUST, ET AL.,

Defendants-Appellants,
Plaintiffs-Appellants

No. 79-1236
and
No. 79-1563

This matter comes on for consideration of:

1. Appellants' motion to postpone oral argument presently scheduled for September 17, 1980, in No. 79-1236;

2. Appellants' motion for consolidation of Nos. 79-1236 and 79-1563;

3. Appellees' objection to appel-

lants' motion to file brief out of time and to file an oversize reply brief.

Upon consideration whereof, it is ordered as follows:

1. The motion to postpone oral argument is denied. No 79-1236 will be argued on September 17, 1980, as scheduled.

2. The motion to consolidate the captioned appeals is denied.

3. The objection to the filing of an oversized brief is overruled.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

EXHIBIT I

Section 3 of the Act of July 1, 1862
12 Stat. 489

"Sec. 3. And be it further enacted, that there be and is hereby, granted to said company [original railroad] for the purpose of aiding in the construction

of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: Provided, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not have been sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

AMOCO PRODUCTION COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	Civil No. C77-215
GUILD TRUST; MELBA L. GUILD; DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,	)	
Defendants.	)	

C O M P L A I N T

COMES NOW plaintiff and for cause of action against defendants, states and alleges as follows:

1. That plaintiff, Amoco Production Company, "Amoco," is a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Illinois.

2. The individual defendants are residents of the State of Wyoming; and the Guild Trust has its situs in the State of Wyoming. The amount in controversy exceeds $10,000, interest and costs excluded.

3. Amoco is the lessee named in a certain Oil and Gas Lease given by Champlin Petroleum Company under date of October 6, 1977, a true, complete and correct copy of which is attached hereto marked Exhibit "A" and is by this reference made a part hereof. Said oil and gas lease covers, among other lands, the lands described as Section 7, Township 14 North, Range 117 West of the 6th P.M., Uinta County, Wyoming, except 25.17 acres of abandoned right of way of the Union Pacific Railroad Company.

4. Plaintiff proposes to drill a well in the NW¼ of said Section 7, Township 14 North, Range 117 West of the 6th P.M.,

Uinta County, Wyoming, but defendants, through their representative, defendant Earl Guild, have refused to allow plaintiff to enter in and upon the said lands for the purposes of drilling such well for oil and gas.

5. Plaintiff is advised and believes, and therefore states the fact to be, that the record title to the surface of the lands above described is vested as follows:

Guild Trust	1/4
Melba L. Guild	1/4
Delmar D. Dean and Mary Melba Guild Dean, husband and wife	1/2

and that such surface title is subject to a contract or contracts under which the said surface owners have agreed to sell to the other defendants the surface of said lands as follows:

Earl Guild and Barbara Jo Guild, husband and wife	1/2

Ferd Christiansen and Eva
Lois Christiansen, husband
and wife 1/2.

6. Under the terms of the oil and gas lease aforesaid, plaintiff is entitled to enter in and upon the lands hereinabove described for the purposes of investigating, exploring, prospecting, drilling and mining for and producing oil and gas and associated hydrocarbons, laying pipelines, building tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products and housing its employees; and the surface ownership of defendants aforesaid is subject to plaintiff's said rights.

7. Defendants, by and through their representative, Earl Guild, refused and do refuse to allow plaintiff to enter in and upon the lands hereinabove described under

its said oil and gas lease for the purposes above set forth and unless restrained by the Court from interfering with plaintiff's said rights of entry and attendant activities under its said oil and gas lease, will continue to deny plaintiff's said rights and to prevent plaintiff from entering upon said lands and conducting the activities which it is entitled to do under its said oil and gas lease. Unless plaintiff is allowed to enter in and upon said lands for such purposes, plaintiff will suffer irreparable damages. Paragraph 3 of the oil and gas lease aforesaid provides that plaintiff must, within three months of October 6, 1977, commence the actual drilling of a test well upon the leased premises and if plaintiff is not allowed to do so, said oil and gas lease will expire, all to plaintiff's damage. In addition, if plaintiff is denied the

right to recover whatever oil and gas is recoverable under the oil and gas lease of plaintiff, it will suffer further irreparable damage. By reason of the fact that commencement of drilling operations must be accomplished over a period of time and cannot be done immediately, unless plaintiff is given access to the lands above described immediately, it may not be able, under the conditions existing, such as availability of drilling rigs and other preliminary work prior to the commencement of the drilling of such well, to commence actual drilling of a well within such three-month period, and, therefore, plaintiff must be given access to said lands for the purposes aforesaid immediately.

WHEREFORE, plaintiff demands:

1. A temporary restraining order of this Court, restraining and enjoining

defendants from interfering with plaintiff's right to enter in and upon the lands hereinabove described for the purposes aforesaid, which should be granted by the Court upon such undertaking as the Court may determine under Rule 65, F.R.C.P.;

2. A preliminary injunction restraining and enjoining defendants from interfering with plaintiff's right to enter upon said lands for the purposes aforesaid during the pendency of this action, after notice and hearing under said rule;

3. Permanent injunction restraining and enjoining defendants from interfering with plaintiff's right to enter upon said lands for the purposes aforesaid; and

4. For such other and further relief as may be just and proper.

DATED this 24th day of October, 1977.

Houston G. Williams, of the firm
WEHRLI AND WILLIAMS
700 First National Bank Building
Casper, Wyoming 82601
(307) 265-0700

Frank Houck, Attorney
AMOCO PRODUCTION COMPANY
Security Life Building
Denver, Colorado 80202
(303) 820-4692

Attorneys for Plaintiff

By /s/ Houston G. Williams
Houston G. Williams

VERIFICATION

STATE OF WYOMING)
) SS.
COUNTY OF NATRONA)

HOUSTON G. WILLIAMS, being first duly sworn, on oath deposes and states: That he is one of the attorneys for plaintiff in the above entitled action; that he has read the within and foregoing "Complaint" of plaintiff, knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

/s/ Houston G. Williams

Subscribed in my presence and sworn to before me this 24th day of October, 1977.

/s/ Jean Frech
Notary Public
My commission expires: March 3, 1980.

EXCERPTS FROM EXHIBIT "A"
(Oil and Gas Lease)
ATTACHED TO COMPLAINT

"3. Lessee, within three months from the date of this lease, shall commence the actual drilling of a test well on the leased premises; and thereafter shall prosecute the drilling of said well diligently, without unnecessary delay and in a workmanlike manner. If the actual drilling of said well is not commenced within the time prescribed, this lease will automatically terminate."

* * * *

"10. All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rule or Regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages for failure to comply thereiwth, if compliance is prevented by, or if such failure is the result of any such Law, Order, Rule or Regulation, or if prevented by an act of God, of the public enemy, labor disputes, inability to obtain material, failure of transportation, or other cause beyond the control of Lessee other than financial."

* * * *

"16. Notwithstanding anything to the contrary in the lease contained, no well shall be drilled upon or into and no facilities shall be installed upon any lands in which Lessor owns the mineral rights only, until the consents of the

surface owners have been obtained under written instruments satisfactory to Lessor. Lessor will endeavor to obtain such consents and the Lessee agrees to cooperate. Any payments which the Lessor elects to pay to the surface owners shall be paid by Lessor out of its royalty.

Lessee shall pay for all damage to surface owners' lands, buildings and growing crops caused by construction, operations or maintenance of facilities, shall bury all pipe lines below plow depth where they cross cultivated lands, shall construct gates where necessary for crossing fenced lands and keep the gates in repair and closed and shall indemnify Lessor with respect to such obligations."

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

AMOCO PRODUCTION COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	Civil No. C77-215
GUILD TRUST; MELBA L. GUILD; DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,	)	
Defendants.	)	

TEMPORARY RESTRAINING ORDER

The above entitled matter coming before the Court upon the verified complaint of plaintiff herein, the Court having examined said complaint and being fully advised finds:

1. Plaintiff is the lessee named in a certain Oil and Gas Lease given by

Champlin Petroleum Company under date of October 6, 1977, covering, among other lands, Section 7, Township 14 North, Range 117 West of the 6th P.M., Uinta County, Wyoming, except 25.17 acres of abandoned right of way of Union Pacific Railroad Company.

2. Defendants Guild Trust, Melba L. Guild, and Delmar D. Dean and Mary Melba Guild Dean, husband and wife, are the owners of the surface of the above described lands; and defendants Earl Guild and Barbara Jo Guild, husband and wife, and Ferd Christiansen and Eva Lois Christiansen, husband and wife, have, by contract, agreed to purchase the surface of said lands.

3. That defendants, through their representative, Earl Guild, have refused to allow plaintiff to enter in and upon said lands under its said oil and gas lease for the purpose of exploring for,

drilling and producing oil and gas, which plaintiff is entitled to do under its said oil and gas lease.

4. The defendants have no right to deny plaintiff, or its drilling contractor, agents, representatives or employees, access to said lands, or the right to go in and upon the same for such purposes; and that unless restrained, the defendants will continue to refuse to allow plaintiff to enter in and upon said lands for such purposes.

5. If plaintiff is denied the right to go in and upon said lands for such purposes, it will suffer irreparable damages for the reason that its oil and gas lease aforesaid requires commencement of the drilling of a test well upon such lands within three months after the date of the lease and if plaintiff is not allowed to drill for, discover and produce oil and

gas from said lands, it will suffer further irreparable damage.

6. That a temporary restraining order should be entered herein, as requested by plaintiff, and that a hearing upon plaintiff's application for a preliminary injunction should be set by the Court.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that a temporary restraining order be and the same hereby is entered against the defendants restraining them from interfering in any way with the plaintiff, its drilling contractor, the drilling contractor's employees and their agents and representatives from entering upon the lands hereinabove described for the purpose of locating, commencing drilling, and drilling to completion of a well for the production of oil and gas and for the removal therefrom and the sale thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a temporary restraining order be and the same hereby is entered requiring defendants to allow plaintiff, its drilling contractor, the drilling contractor's employees, and their agents and representatives to enter upon the lands aforesaid for such purposes.

IT IS FURTHER ORDERED that this temporary restraining order be issued upon the undertaking to be filed by plaintiff in the amount of $5,000.00, deposited with the Clerk of this Court and approved by said Clerk as required in the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that a hearing upon plaintiff's request for a preliminary injunction be and the same hereby is set before this Court in the courtroom of this Court, Federal Center, Cheyenne, Wyoming,

on the 3rd day of November, 1977, at the hour of 9:30 o'clock A.M., when and where defendants may appear and be heard.

IT IS FURTHER ORDERED that a copy of this temporary restraining order be served upon the defendants together with the summons and complaint herein, as provided by the Federal Rules of Civil Procedure.

DATED this 27th day of October, 1977.

/s/ Clarence A. Brimmer
J U D G E

Issued this 27th day of
October, 1977 at 3:00 o'clock
P.M.

/s/ Clarence A. Brimmer
DISTRICT JUDGE

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

AMOCO PRODUCTION COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	No. C77-215K
GUILD TRUST; et al.,	)	
Defendants.	)	

ORDER EXTENDING TEMPORARY RESTRAINING ORDER AND ALLOWING DEFENDANT TO FILE MEMORANDA

The above-entitled matter having come on regularly for hearing before the Court upon the plaintiff's Motion for Preliminary Injunction, plaintiff appearing by and through its attorneys, Houston G. Williams and D. Thomas Kidd, and the defendants having failed to appear in person or by counsel, and the Court having heard the arguments of plaintiff's counsel

and the evidence introduced in support of said motion, and being fully advised in the premises; NOW, THEREFORE, IT IS

ORDERED that the defendants have ten (10) days from the date of this Order to submit any memoranda in opposition to the entry of a permanent injunction; it is

FURTHER ORDERED that the Temporary Restraining Order previously entered in this matter be, and the same is, hereby extended until November 13, 1977.

Dated this 3rd day of November, 1977.

/s/ Ewing T. Kerr
U. S. District Judge

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, Plaintiffs, vs. GUILD TRUST; MELBA L. GUILD; DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife, Defendants, UNION PACIFIC RAILROAD COMPANY, a corporation; UPLAND INDUSTRIES CORPORATION, a corporation, Additional Defendants on Counterclaim.	Civil No. C77-215K ANSWER AND COUNTER-CLAIM

ANSWER

First Defense

The complaint fails to state a claim

upon which injunctive relief can be granted against defendants in this action.

Second Defense

The complaint fails to state a claim upon which injunctive relief can be granted against defendants in this action.

Third Defense

Plaintiffs Champlin Petroleum Company and Union Pacific Land Resources Corporation are subsidiaries and instrumentalities of, and are owned and controlled by Union Pacific Railroad Company, a Utah corporation authorized to do business and actually doing business in the State of Wyoming. Said Union Pacific Railroad Company is an indispensable party to this action, can be made a party without depriving this Court of jurisdiction of the present parties to this action, and has not been made a party in this action by plaintiffs.

Fourth Defense

The temporary restraining order was issued against defendants without notice or opportunity to be heard, without compliance with the requirements of Rule 65, without right of plaintiff Amoco under its lease or otherwise to enter and drill a test well upon defendants' lands, and without possibility of imminent or irreparable harm to Amoco justifying injunctive action against defendants. The temporary restraining order, under which Amoco is drilling a test well on defendants' lands without adequate bond, does not preserve but drastically alters the status quo to defendants' irreparable harm, operates as a transfer by the Court of the exploration rights in defendants' lands to Amoco, and exposes defendants to grievous and irreparable harm from the destruction or diminution of the substantial lease or sale value

of the oil and gas estate in their lands which the drilling of a dry or otherwise unfavorable hole will cause. The "temporary" restraining order, issued November 27, 1977, and to continue in effect over defendants' objections until further order of the Court, has already been continued for far too long a time, has in effect become a preliminary injunction without compliance with the requirements of due process of law and Rule 65, and constitutes a taking of defendants' property without due process of law.

Fifth Defense

This Court should decline or defer the exercise of its jurisdiction in this case, and remit the parties to their remedies in the state courts of the State of Wyoming. While the only issue presented by plaintiffs' pleadings to this Court is the right of plaintiff Amoco to enter and drill a test

well upon defendants' lands, Amoco's right to do so turns upon the unsettled state law question of the ownership of the oil and gas estate in these lands.

As previously stated by defendants in their Motion to Dissolve Restraining Order, etc., it is in western Uinta County that the Union Pacific Railroad, with its every odd section of land grant lands for 20 miles on each side of its main line, crosses the newly discovered and oil rich Overthrust Belt. In this area the railroad, at various times before and after the turn of the century, sold off large portions of these lands in small parcels to numerous purchasers, with various purported reservations of "all coal and other minerals" in one form or another, which reservations the railroad now claims and the landowners involved deny reserved to the railroad the oil and gas estate in these lands. The

Supreme Court of the State of Wyoming has never ruled on the meaning and effect of these ambiguous reservations as they pertain to the oil and gas estate, and any judgment which might be pronounced by this Court must of necessity be a forecast rather than a determination of the issue.

Defendants submit that it would be improper and self-defeating for this Court to attempt a determination of this issue, as in any event the issue must and will ultimately be authoritatively determined by the Supreme Court of the State of Wyoming. As the issue involves a large number of landowners in Uinta County and elsewhere in the State of Wyoming, and as a decision of this Court is not binding upon the state courts, and as there are many different factual situations that must be considered in connection with the railroad's purported reservations, it is inevitable that as

conflicts arise between the railroad and the landowners over the ownership of the oil and gas estates in the various land grant lands sold by the railroad, the issues involving the railroad's reservations will be presented to the state courts for determination. Because diversity will not always exist, various of these lands being owned by Utah citizens or corporations, these cases cannot always be initiated in or removed to the Federal courts, nor should they be, and the issues will be finally resolved by the Wyoming state courts in any event. As the question is open and its resolution can go either way, a decision by this Court in this case might very well be "reversed" by the Wyoming Supreme Court. In the meantime, this case could, and undoubtedly would, be tied up at the appeal level until a definitive decision on the unsettled state law issue was

handed down by the Wyoming Supreme Court.

Based on the foregoing, it is respectfully submitted that this is a proper case for abstention by this Court, for the following reasons:

(1) The unsettled issue of state law is determinative of the controversy in the case at bar, and the resolution of this issue must necessarily involve the determination and application of a rule of Wyoming state property law affecting title to lands within its borders, a matter in which the State of Wyoming has an important, substantial and dominant interest.

(2) Any decision by this Court on the unsettled state law issue must of necessity constitute only a guess or forecast, and not a determination, of that issue. The issue will eventually have to be resolved by the Wyoming state courts in any event, and

sound judicial administration requires that the parties in the case at bar be given the benefit of the same rule of law which will apply to other landowners within the State of Wyoming similarly situated.

(3) The unsettled issue of state law is difficult and uncertain, its importance far transcends the result of the case at bar, and the parties can obtain a determination of the issue by the state courts at least as quickly as by this Court.

(4) The pleadings in the case at bar are confused and the state law issue is not at present properly raised and presented. Abstention by this Court at this early stage of the proceedings will permit the parties to obtain an early and definitive resolution of the issue in the state courts without further unnecessary litigation in the Federal courts, and will effect a wise

conservation of judicial resources and minimize time and expense of litigation for the parties.

Sixth Defense

1. Defendants admit the allegations contained in paragraphs 1, 2, 3 and 4 of the complaint.

2. Answering paragraph 5 of said complaint, defendants admit the allegations thereof and affirmatively allege that their title to said lands includes not only the surface estate, but also the estate in the oil, gas, and all other minerals not reserved by the Union Pacific Railroad Company.

3. Answering paragraph 6 of said complaint, defendants admit the lease purportedly authorizes Amoco to enter upon defendants' lands for the purposes set forth therein, and denies that said lease actually

confers upon Amoco any legal or equitable right to do so.

4. Answering paragraph 7 of said complaint, defendants admit that they have refused and, except for the temporary restraining order issued by the Court, would continue to refuse Amoco access to their lands for the purpose of drilling a test well or for any other purpose, and defendants affirmatively allege that Amoco has no right to enter and drill upon their lands.

5. Defendants deny each and every allegation contained in said complaint not otherwise herein expressly admitted.

COUNTERCLAIM

Defendants allege:

1. This is an action to quiet title to certain lands located in Uinta County, State of Wyoming, and is thus within the

District of Wyoming.

2. The jurisdiction of this Court is invoked under 28 U.S.C. 1332. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between citizens of different states.

3. The individual defendants are all residents of the State of Wyoming, and the Guild Trust has its situs in the State of Wyoming. Additional Defendant Union Pacific Railroad Company is a Utah corporation with its principal place of business in Nebraska; Plaintiff Champlin Petroleum Company is a Delaware corporation with its principal place of business in Texas or Oklahoma; Plaintiff Union Pacific Land Resources Corporation is a Utah or Nebraska corporation with its principal place of business in Nebraska; Additional Defendant Upland Industries Corporation is a Nebraska corporation with its principal place of

business in Nebraska; and Plaintiff Amoco Production Company is a Delaware corporation with its principal place of business in Illinois. Champlin Petroleum Company, Union Pacific Land Resources Corporation and Upland Industries Corporation are subsidiaries and instrumentalities of, and are owned and controlled by, Union Pacific Railroad Company. Amoco Production Company is a lessee of Champlin Petroleum Company.

4. Defendants are the owners in fee and are in possession of the following described real property, and own the oil, gas and associated liquid and gaseous hydrocarbons estate in said real property, situated in Uinta County, State of Wyoming, and more particularly described as follows:

Township 14 North, Range 117 West, 6th P.M.

Section 7: Lots 1, 2, 3 and 4, E½W½, SE¼

480 Acres

5. Plaintiffs and Additional Defendants are believed to claim some interest in and to the oil and gas estate of the real property described in paragraph 4 above, and any and all such claims are adverse to and in conflict with the ownership and title of defendants. Defendants hereby seek to quiet title in themselves as against any and all claims of Plaintiffs and Additional Defendants in and to the oil and gas estate in the real property described above.

6. The claims of Plaintiffs and Additional Defendants in and to any oil and gas interest in the above described real property are without merit.

WHEREFORE, defendants demand:

(1) That plaintiffs take nothing by their complaint herein, that said complaint be dismissed, that the temporary restraining

order issued herein be forthwith dissolved and vacated, and that defendants have judgment against plaintiff Amoco Production Company for all damages caused defendants by Amoco's drilling of a test well on defendants' lands.

(2) In the alternative, that this Court, on abstention grounds, decline or defer exercise of its jurisdiction in this case, vacate and dissolve forthwith its temporary restraining order, and remit the parties in this action to their remedies in the state courts of the State of Wyoming.

(3) In the alternative, if dismissal and abstention are denied and refused, that this Court make its adjudication quieting title in defendants to the real property described in paragraph 4 of their counterclaim, including the oil and gas estate, and adjudicating that Plaintiffs and

Additional Defendant have no right, title or interest whatsoever in or to said real property or the oil and gas estate therein.

(4) Judgment for all costs incurred by defendants in this action.

(5) Such other and additional relief as shall appear to be appropriate.

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John D. Troughton, Attorney
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(307) 877-3973

Attorneys for Defendants

By /s/ Charles D. Phillips
Charles D. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 1977, I mailed copies of the foregoing Answer and Counterclaim, postage prepaid, to the following:

Houston G. Williams, Esq.
Wehrli & Williams
700 First National Bank Bldg.
Casper, Wyoming 82601

Frank Houck, Esq.
Security Life Bldg.
Denver, Colorado 80202

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Casper, Wyoming 82601

/s/ Charles D. Phillips
Charles D. Phillips

80-1928
No. A-846

FILED
MAY 29 1981
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

GUILD TRUST,
MELBA L. GUILD,
DELMAR D. DEAN and MARY MELBA GUILD DEAN,
EARL GUILD and BARBARA JO GUILD,
FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN,
Petitioners,

v.

AMOCO PRODUCTION COMPANY,
CHAMPLIN PETROLEUM COMPANY,
UNION PACIFIC LAND RESOURCES CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether as a matter of Wyoming law a reservation of "all coal and other minerals" together with the exclusive right "to mine for and remove . . . all such coal and other minerals," made in a deed conveying real property, includes oil and gas.

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No. A-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GUILD TRUST,
MELBA L. GUILD,
DELMAR D. DEAN and MARY MELBA GUILD DEAN,
EARL GUILD and BARBARA JO GUILD,
FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN,
Petitioners,

v.

AMOCO PRODUCTION COMPANY,
CHAMPLIN PETROLEUM COMPANY,
UNION PACIFIC LAND RESOURCES CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This Brief is submitted by respondents Amoco Production Company ("Amoco'), Champlin Petroleum Company, and Union Pacific Land Resources Corporation, who were the appellees in the court below, in opposition to the Petition for Certiorari in this case.

COUNTERSTATEMENT OF THE CASE

This is a diversity suit to resolve a dispute over title to minerals in approximately 455 acres of Wyoming land. At issue is the effect under Wyoming law of the

mineral reservation in a 1909 deed from Union Pacific Railroad Company ("the Railroad"), conveying the surface estate in the land to predecessors of the petitioners, Guild Trust *et al.* The deed reserved to the Railroad and its successors "all coal and other minerals," together with exclusive rights "to mine for and remove any and all such coal and other minerals . . . ."[1] Petitioners claim that this reservation does not include oil and gas.

The litigation arose in October 1977, when petitioners refused to allow respondent Amoco to drill on the land for oil and gas. Amoco leases the oil and gas rights from respondent Champlin Petroleum Company, which together with respondent Union Pacific Land Resources Corporation has succeeded to the Railroad's reserved mineral rights.

---

[1] The reservation in the deed reads as follows:

> Excepting and reserving to said Union Pacific Railroad Company, its successors and assigns,
>
> First: A strip of land two (200) hundred feet wide on each side of the center line of the railroad of said Union Pacific Railroad Company as said road is now constructed over and across said land.
>
> Second: All coal and other minerals within or underlying said lands.
>
> Third: The exclusive right to prospect in and upon said land for coal and other minerals therein, or which may be supposed to be therein, and to mine for and remove, from said land, all coal and other minerals which may be found thereon by any one.
>
> Fourth: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from such prospect places or mines and for the convenient and proper operation of such prospect places, mines and for roads and approaches thereto or for removal therefrom of coal, mineral, machinery or other material.

At trial, neither party offered any direct evidence of the subjective intent of the parties in 1909 when the deed was executed, other than the language of the mineral reservation itself. Respondents contended that the reservation includes oil and gas as a matter of law. In addition, they submitted evidence showing that in Wyoming the language of the reservation would have been understood to include oil and gas at the time it was made. Petitioners relied upon scattered documents unrelated to the transaction or the instruments or the land at issue, from which they sought to infer that, in reserving "all coal and other minerals" and exclusive mining rights in the 1909 deed, the Railroad would have intended to reserve only "coal" and not "other minerals."[2]

The trial court held as a matter of law that in Wyoming, as under the majority rule prevailing outside Pennsylvania and Arkansas, the reservation of "all coal and other minerals" severed the entire mineral estate from the surface, and unambiguously reserved all minerals including oil and gas. (App., Ex. B),[3] The court relied, *inter alia,* on a number of Wyoming au-

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[2] Although petitioners did not request production of documents until 40 days after the trial court's deadline for completion of discovery, the court postponed a scheduled trial date and permitted petitioners to discover all documents relating to the sale and conveyance of the land at issue and the reservation of minerals therein. Upon production of these documents, the court reset the case for trial 2½ months later, on a date agreed to by petitioners's counsel. On the eve of trial, petitioners nonetheless demanded massive additional discovery regarding all land sales made by the Railroad or its predecessors over a period of more than a century. This second untimely discovery request was denied.

[3] Citations to "App." are to the Appendix to the Petition.

thorities indicating that Wyoming would follow the majority rule, on the settled legal meaning of federal reservations of "all coal and other minerals" as determined in *Skeen* v. *Lynch*,[4] and on the considerations favoring such a settled legal rule for interpreting reservations of minerals under Wyoming law advanced by a prominent authority on oil and gas law.[5] Since the effect of the reservation was a question of law, the court concluded that the extrinsic evidence introduced by both parties was irrelevant and could not be permitted to vary the settled legal meaning of the language used. The court also found that, were extrinsic evidence of intent to be considered, the evidence of the prevailing Wyoming usage at the time of the reservation also indicated that the reservation includes oil and gas. (App. 28-29.) The court later reconsidered and reaffirmed its holding in an Order of January 5, 1978, in which it rejected petitioners' belated contention that the inclusion of rights "to mine" makes the reservation of "all coal and other minerals" ambiguous.[6]

In the judgment petitioners seek to review (App., Ex. A), the Tenth Circuit Court of Appeals unanimously affirmed the district court's holding and adopted its reasoning. In addition, the court of appeals found corroboration of the trial court's reading of the law of Wyoming in the Wyoming Supreme Court's subsequent decision in *Coronado Oil Co.* v. *Grieves*, 603

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[4] 48 F.2d 1044 (10th Cir.), *cert. denied*, 284 U.S. 633 (1931).

[5] App. 33-35, *citing* Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 Wyo. L.J. 107 (1949).

[6] Order Denying Defendants' Motion for New Trial, January 5, 1978, attached as the Appendix to this Brief.

P.2d 406 (Wyo. 1979).[7] The opinion of the Wyoming Supreme Court in that case cited approvingly the district court's decision in the present case, relied upon the Wyoming authorities cited therein, and concluded that in Wyoming at the turn of the century "oil was considered generally to be a mineral and an oil well to be a mine." *Id.* at 411.

ARGUMENT

The Petition presents no considerations that warrant review by this Court on *certiorari*. The title question decided by the courts below is governed entirely by Wyoming real property law and the state-law rules for interpreting instruments of title. Although the 455 acres of land at issue were originally granted to the Railroad's predecessor by an 1862 Act of Congress,[8] the Petition raises no question under that Act or under any other federal law. Nor is there any contention that the result reached below conflicts with decisions of this Court or of any of the Circuits. Since the case was decided as a matter of law, and with the benefit of exhaustive briefing by petitioners in both courts on the relevant legal questions, none of the discretionary pretrial procedural rulings of which petitioners broadly complain could have affected the result.

Moreover, while the legal effect of the reservation of "all coal and other minerals" was a question of first impression under Wyoming law, the decisions below

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[7] The holding in *Coronado Oil* was that provisions of the Wyoming Constitution of 1890 and a 1907 Wyoming statute authorizing condemnation of rights of way for "mining" purposes permitted condemnation for purposes of extracting oil and gas.

[8] Pacific Railroad Act of 1862, 12 Stat. 489, *as amended by* 13 Stat. 356 (1864).

are entirely consistent with the jurisprudence of that state. They are supported by pertinent Wyoming authorities cited by both courts; there is no Wyoming authority to the contrary; and the district court's opinion has now been endorsed by the Wyoming Supreme Court itself in the *Coronado Oil* case, *supra.* As noted by both courts below, the result also conforms to the majority rule followed in other jurisdictions.

Indeed, petitioners acknowledge that a reservation of "all coal and other minerals," standing alone, unambiguously reserves oil and gas as a matter of law. (Petition, pp. 43-44.) Their whole argument is that this unambiguous reservation is rendered ambiguous by the use of "mining" terminology elsewhere in the reservation. (*Id.* pp. 45-58.) That contention has been squarely rejected as applied to indistinguishably-worded reservations under the law of other jurisdictions. *Rowe* v. *Chesapeake Mineral Co.,* 156 F.2d 752 (6th Cir.), *cert. denied,* 329 U.S. 776 (1946); *Shell Oil Co.* v. *Dye,* 135 F.2d 365 (7th Cir. 1943); *Sellars* v. *Ohio Valley Trust Co.,* 248 S.W.2d 897 (Ky. 1952); *Warren* v. *Clinchfield Coal Corp.,* 166 Va. 524, 186 S.E. 20 (1936); *see* also *Skeen* v. *Lynch, supra.* And it is effectively refuted by the Wyoming *Coronado Oil* decision, holding that "mining" includes drilling under Wyoming laws enacted contemporaneously with the reservation at issue and recognizing that in Wyoming an oil and gas well has long been regarded as a "mine." 603 P.2d at 411.

The ancillary questions tendered by the Petition are no more appropriate for review by this Court than is the application of Wyoming law to the 1909 mineral reservation:

(a) The Petition raises a question as to the effect on the Railroad's title in 1909 of an 1867 mortgage

executed by the Railroad's predecessor. (Petition, pp. 59-61.) Petitioners' argument on this question, which was made at best obscurely in the court below,[9] appears to be that legal title to the land was in the mortgage trustees as long as the mortgage was in effect, and that the Railroad, lacking title, could not reserve the minerals. Apart from other difficulties,[10] that argument is self-defeating for petitioners: If the Railroad lacked title to the land at the time of the conveyance as petitioners contend, it could not have conveyed valid title to petitioners' predecessors, and the petitioners would have no claim under the deed even to the surface, much less to the minerals that were expressly excluded from the deed. In any event, assuming the argument had any possible merit, it concerns nothing

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[9] *See* Brief of the Appellants to the Court of Appeals, p. 44.

[10] As respondents showed in their brief to the court of appeals, petitioners' mortgage argument is untenable on multiple grounds. (Brief of the Appellees, pp. 44-45.) First, the mortgage is irrelevant to the Railroad's title at the time of the 1909 deed, because it was formally released in 1904, five years before the date of the deed. (Petition, p. 26.) Second, the land was in fact freed of the mortgage lien in 1899, when it was conveyed to the Railroad by its predecessor free and clear of all prior liens and encumbrances, pursuant to a foreclosure of another mortgage. *See* Special Master's Deed, April 20, 1899 (Plaintiffs' Ex. 2); Union Trust Co. v. Union Pacific Ry., Final Decree ¶ 23 (D. Wyo., Dec. 1, 1898). Third, even while the mortgage was in effect, the mortgagor had an equity of redemption to support a reservation of minerals, and nothing in the mortgage was inconsistent with such a reservation. Fourth, petitioners' attack on the validity of a portion of the instrument on which their own claim of title is based is barred under the doctrine of estoppel by deed. *E.g.*, Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956) *cert. denied*, 354 U.S. 938 (1957); Mortenson v. Northern Pac. Ry., 295 F. Supp. 158 (D. Mont. 1969), *aff'd sub nom.* Mortenson v. Burlington Northern, Inc., 434 F.2d 1314 (9th Cir. 1970); 31 C.J.S. *Estoppel* § 38f.

more than the interpretation of a mortgage under applicable state law, and provides no basis for review by *certiorari*.

(b) The Petition also challenges the court of appeals' denial of petitioners' last-minute motion to postpone the scheduled oral argument in this case so as to permit consolidation with a later case brought by petitioners in early 1978 (*"Guild II"*). Petitioners' motion to consolidate was not filed until 12 days before the scheduled oral argument, even though both cases had been pending separately before the court of appeals for more than a year. The motion was an abrupt about-face for petitioners, who had previously argued that all proceedings in *Guild II* should be stayed until after a final decision on appeal in this case.[11] In these circumstances, the court's exercise of its discretion to deny petitioners' untimely motion presents no question for review by this Court.[12]

(c) Finally, the Petition contends that the courts below erred by deciding this case at all, rather than abstaining and remitting respondents to the Wyoming state courts. Although petitioners raised this issue in

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[11] Appellants' Objection to Calendar Assignment, Motion for Stay, and Motion for Abstention (in the court of appeals), August 31, 1979, p. 3; Motion to Vacate Summary Judgment Hearing and to Stay Further Proceedings (in the district court), February 28, 1979; Motion to Vacate Order Overruling Motion to Vacate Summary Judgment Hearing, and for Order to Stay Further Proceedings (in the district court), March 14, 1979.

[12] Petitioners' contention that they may be barred by collateral estoppel from litigating in *Guild II* unspecified questions that they did not raise in this case is premature. It goes to the appropriate scope for any application of collateral estoppel in *Guild II*, which is still pending in the court of appeals, not to the appropriateness of deciding the present case separately on its own merits.

both courts below, the Petition cites no authority and advances no consideration suggesting that there is any substantial abstention question for this Court to review. In fact, under the controlling decisions of this Court, federal courts have equitable discretion to abstain from deciding unsettled questions of state law only under three "extraordinary and narrow" circumstances. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 813-16 (1976), quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). Otherwise, a federal court has a "duty . . . to adjudicate a controversy properly before it," *id.* at 813, and "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction . . . ." *Meredith* v. *Winter Haven*, 320 U.S. 228, 235 (1943); *accord*, *McNeese* v. *Board of Education*, 373 U.S. 668, 673 (1963). Here, there is no constitutional question, no difficult question implicating state legislative or governmental policy and no criminal or tax proceedings to be disrupted.[13] This title case presents only a routine question of state common law of a kind routinely decided by federal courts in diversity cases.[14] As this Court's decisions make clear, abstention from deciding such questions is not even permissible, much less required. The fact that the courts below performed their "duty . . . to adjudicate" this case is not a ground for review on *certiorari*.

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[13] Colorado River Water Conservation District v. United States, *supra*, 424 U.S. at 814-16.

[14] *E.g.*, Rowe v. Chesapeake Mineral Co., *supra*; Shell Oil Co. v. Dye, *supra*; Lutes v. United States District Court, 306 F.2d 948 (10th Cir.), *cert. denied*, 371 U.S. 941 (1962).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX TO THE BRIEF IN OPPOSITION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-215K

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, *Plaintiffs*,

vs.

GUILD TRUST; MELBA L. GUILD; DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FERD CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife, *Defendants*.

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL

Filed January 5, 1979

The above-entitled matter coming on regularly for hearing before the Court on defendants' Motion for New Trial dated December 11, 1978 and plaintiffs' Response thereto of December 28, 1978; and the Court having considered, in addition to said Motion and Response, the entire brief filed by the defendants after trial, including specifically the late filed supplemental portion thereof filed on December 1, 1978 after the Court's final deadline for the submission of briefs and after the Court's Opinion and Judgment of November 29, 1978 had been entered, as well as the Memorandum Brief of plaintiffs timely filed September 5, 1978, and the Court having reviewed each of its rulings that are complained of in the defendants' Motion for New Trial and having found no error therein, and the Court further finding that no good ground exists for a

new trial in this case, and being fully advised in the premises; the Court finds as follows:

1. That the authorities cited in defendants' brief do not support their contention that there is a generally recognized rule of law or a rule of Wyoming law under which the mineral reservation in this case must be deemed ambiguous;

2. That, as indicated in authorities cited at page 6-7 of the Court's Memorandum Opinion of November 29, 1978, at least in Wyoming the term "mines" has long included oil and gas extraction sites and the term "to mine" has long included the process of extracting oil and gas from the earth, and therefore the inclusion of these terms in the reservation in this case does not introduce any ambiguity into the reservation under Wyoming law;

3. That the Court's holding that the reservation at issue is unambiguous and severs the mineral estate from the surface, including the oil, gas and associated liquid and gaseous hydrocarbons, and reserved the mineral estate to the grantor, was based on the totality of the authorities and considerations discussed in its Memorandum Opinion, and not solely on Burke v. Southern Pacific Railroad Co., 234 U.S. 669 (1914), and Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), which cases the Court nonetheless considers to exemplify the settled unambiguous meaning of the language of the reservation;

Now, Therefore, It Is Ordered that defendants' Motion for New Trial be, and the same is, hereby denied.

Dated this 5th day of January, 1979.

Ewing T. Kerr
U. S. District Judge